

**ADOPTION OF RULE AMENDING DAM SAFETY REGULATIONS  
SECOND ASSESSMENT OF PUBLIC COMMENTS (JULY 2009)**

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**I. INTRODUCTION**

On February 13, 2008, the New York State Department of Environmental Conservation (NYSDEC) issued a Notice of Proposed Rule Making to amend the dam safety regulations at Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (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.

Three public hearings (formally known as legislative hearings) were held concerning the proposed rule making on April 15 and 18, and on May 2, 2008, in Poughkeepsie, Rochester and Albany, respectively. The public comment period for the proposed rule making closed 15 days after May 2, 2008, the date of the last public hearing. During the first public comment period, a large volume of comments were received from a variety of sources, and through a variety of mediums.

Based on the large volume of public comments received and upon extended further analysis, the NYSDEC issued a Revised Notice of Rule Making to amend the dam safety regulations at 6 NYCRR Parts 608, 621.4, and 673 on May 20, 2009. A second public comment period followed, which closed on June 19, 2009. During the second public comment period, a smaller volume, of written comments, were received, from a variety of sources.

This Second Assessment of Public Comment (SAPC) summarizes, condenses, and codifies all of the comments that were received during the May – June 2009 second public comment period in an effort to make the comments more accessible to the public, and to assist the NYSDEC staff who exhaustively reviewed and analyzed the comments.

## **II. METHODOLOGY**

In the Comment and Response Index portion of this SAPC (please see Section V), each submission that was received during the second public comment period was assigned one of the following category codes. The lettered category codes describe the types of entities which submitted the public comments:

- I Individual (public) comments.
- G Groups and associations.
- F Federal agencies and officials.
- S State agencies and officials.
- L Local agencies and officials.
- C Corporations and for-profit businesses.

These category codes were assigned for the convenience of readers and to assist in the organization of this SAPC; no comment or entity making a comment enjoys any priority or special treatment in the NYSDEC responses.

The public comments are presented in the Comment and Response Index in groups according to the category codes that are listed above. Within each of the categories, the public comments are presented and assigned a source number, such as I-1, G-1, and so on. In addition, each separate comment from a single source was assigned a separate comment number. Thus, for an individual who made three different comments (e.g., within a letter), each of the three comments would be designated separately as I-1.1, I-1.2, and I-1.3, respectively.

A list of all sources of comments appears in Section V.

In addition to being summarized in the Comment and Response Index (Section VI), complete copies of all written submissions have also been included in Section VII of this SAPC. The alphanumeric code associated with each written submission is marked at the top of the first page of each letter and the sub-numbers of the individual comments are marked in the margin next to the text that begins the comment.

### III. LOCATING RESPONSES TO COMMENTS

#### KINDS OF RESPONSES

Public comments and NYSDEC responses can be found in two locations.

1. **Frequent comments** are those that were submitted by numerous members of the public. A frequent comment may be a combination of several comments on a similar topic. Frequent comments and the associated NYSDEC responses follow below in Section IV.
2. **Individual comments** are answered directly in the Comment and Response Index (Section V)

#### IV. FREQUENT COMMENTS AND NYSDEC RESPONSES

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Frequent comments are those that were submitted by numerous members of the public. A frequent comment is typically a combination of several comments on a similar topic. One response has been provided by NYSDEC to each frequent comment. If a specific comment is considered part of a frequent comment, the response in the Comment and Response Index will indicate it as such with the following phrase: "Please see response to Frequent Comment #1" (or other appropriate comment number). If a specific comment needed a response beyond what was included in the frequent comment response, that additional comment-specific response also appears in the Comment and Response Index.

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##### **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. As a convenience, NYSDEC reprints below the May 2009 Frequent Comment #1 which states in its entirety:

Many comments expressed concern over the high costs that will result from the additional engineering assessments, safety inspections, and financial security requirements discussed in the proposed regulations. Small groups and associations -- as well as local officials -- expressed that these additional costs will mean bankruptcy. Additionally, many individuals expressed concern that the added cost of compliance will force these individuals to breach their small dams rather than comply. According to some, the dams that are breached will have an adverse effect on the ecosystems supported by those dams and on the overall aesthetics of the property, ultimately leading to a decreased property value and tax-base. Concerns over the potential for increased insurance costs were also raised. If these costs remain, many individuals expressed that there should be various forms of assistance from the State including an insurance program or a grant program.

(SAPC Comments I-4.1, I-5.18, I-5.20, I-5.21, G-1.1, G-2.1, G-2.2, G-2.3, G-2.4, G-2.6, G-3.1, G-3.4, G-3.5, G-5.1, G-5.3, G-5.4, G-5.7, G-6.1, G-7.1, G-7.2, G-7.3, G-7.4, G-8.4, G-9.1, G-11.1, G-11.2, G-11.7, G-13.2, G-14.1, G-14.2, G-14.3, G-14.4, G-15.16, G-16.3, G-18.3, L-2.2, S-2.1, S-2.2, S-2.4, S-2.11, S-2.15)

**Response:**

Reprinted below is the response to Frequent Comment #1 from the May 2009 Assessment of Public Comments, in its entirety:

NYSDEC's job in drafting the proposed dam safety regulations was largely to implement the 1999 amendments to the dam safety provisions in the Environmental Conservation Law (ECL) at §15-0507. In order to do that, NYSDEC spent a great deal of time and effort researching the laws, regulations, and policies of other states and of federal agencies. We focused on northeastern states in particular. The proposed dam safety regulations and the revisions thereto, generally reflect the state of the practice in dam safety. While we recognize the costs associated with these regulations, it is important to note that these costs are primarily the cost of operating and maintaining a dam in a safe condition, as widely understood in the industry, which is a longstanding statutory obligation of dam owners. Moreover, compliance with a strong regulatory framework may help to contain or even lower insurance costs.

Some comments mistakenly assert that NYSDEC had been responsible for these assessments, inspections, plans, and functions and the proposed dam safety regulations represent a change whereby responsibility is shifted to dam owners. However, dam owners have long been responsible for their dams as a matter of law, through statute, and by tradition. Please see also the Response to Frequent Comment #3 regarding owners.

Nevertheless, in response to these comments, the revised dam safety regulations include several changes designed to address the cost of compliance. For example, the revised regulations:

- Create two categories of Class C (High Hazard) dams: SMALL and LARGE. Extend the date by which the first Engineering Assessments are due for Small Class C (High Hazard) and Class B (Intermediate Hazard) dams (see NYCRR §673.13).
- Require Safety Inspections at a frequency that shall appear in a schedule that is part of an Assessment, not on a schedule that is explicitly stated in the regulations. NYSDEC expects that most Class C (High Hazard) dams will have more frequent Safety Inspections required under their Inspection and Maintenance plans, but removing the schedule from the regulations allows greater flexibility to determine the appropriate schedule for a specific dam (see NYCRR §673.12).
- Require an Enhanced Safety Program only for dams that have been assigned a particular Condition Rating. Safety Inspections,

Engineering Assessments, Financial Security and other measures can be required as appropriate if dam is assigned a Condition Rating of “deficiently maintained”, “unsafe” or “unsound. This approach addresses public safety, allows NYSDEC to focus on deficient dams, and rewards responsible owners of well-maintained dams (see NYCRR §673.16).

- 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 (see NYCRR §673.16).
- Require Emergency Action Plans for Class B (Intermediate Hazard) dams 2 years from effective date of regulations, instead of 12 months from effective date (see NYCRR §673.7).

Although NYSDEC staff agree that a funding mechanism to help dam owners rehabilitate their dams would be beneficial, this issue is outside the scope of the statutory authority for this rule making. Financial assistance to dam owners must be addressed through the legislative amendment and budget processes.

**Frequent Comment #2:**

Numerous comments were received relative to subparts 673(2)(j) and 673.7 regarding Emergency Action Plans (EAP’s). Comments were concerned with the definition of an emergency action plan, as well as the development, updating, and submission of the EAP. EAP development concerns ranged from what is required, what sections of the EAP need to be developed by an engineer, whether electronic submittals could be made, and inundation mapping standards. A commenter was concerned about the role of emergency management authorities given the regulations (Part 673.7 (g) and (h)) require the dam owner to fully implement all provisions of the EAP. Another commenter wanted to know if it was NYSDEC’s intent under Part 608.6(b)(4) to require an owner of a “B” or “C” hazard class dam to submit an EAP with a permit application. Finally, it was recommended that the time frame for submitting the EAP following a hazard classification change should be extended from 12 months to 24 months.

(SAPC Comments I-1.5, I-5.11, I-5.12, I-5.13, I-5.14, I-5.15, I-5.16, G-2.5., L-3.17, L-3.19, L-3.30, S-2.8)

**Response:**

NYSDEC considered U.S. Army Corp and FEMA provisions regarding EAP’s, including definitions, during the course of this rule making, as well as the provisions of many states, and finds subpart 673.2(j) to be appropriate as drafted. The revised regulations must interpret New York's existing dam safety statute, and be consistent with New York's existing permitting requirements, regulations and guidance.

The NYSDEC currently has guidance on emergency action plans in Chapter 8 of the NYSDEC’s guidance document entitled, "An Owner's Manual for the Inspection and Maintenance of Dams in New York," which specifically addresses EAP’s and is available on NYSDEC's website ([www.dec.ny.gov](http://www.dec.ny.gov)). More current federal guidance for EAP

development exists (FEMA 64 - Federal Guidelines for Dam Safety: Emergency Action Planning for Dam Owners), available for download from the FEMA web site ([www.fema.gov](http://www.fema.gov)). NYSDEC plans to issue additional guidance on the preparation of EAP's.

If the owner has fully implemented all provisions of the EAP for which the owner has responsibility, the owner will have fully implemented the EAP.

In Subpart 673.7(b), a hard copy of the initial EAP is required by the NYSDEC, emergency responders, and other applicable agencies. Emergency responders and/or agencies can be asked if future submittals can be electronic copies and/or electronic updates.

EAP's have been a longstanding element of an owner dam safety program. The NYSDEC has requested EAP's from high hazard, Class C, dam owners since approximately the 1980's, and it has long been a standard practice to require an updated EAP as part of a permit application for Class C dams. NYSDEC wrote letters to all Class C dam owners in 2001, 2007, and 2008 requesting they submit EAP's. NYSDEC believes the time frames for implementation are appropriate.

**Frequent Comment #3:**

There were several comments regarding dam hazard classifications, subpart 673.5. It was recommended that the NYSDEC add additional language to include natural resource damage and/or economic loss to property owners of the impoundment's shorelines; provide an analysis when NYSDEC changes a hazard classification; and ensure that all dams are assigned a hazard classification. In addition, a commenter requested that guidance on the incorporation of natural resource damage in hazard classification determinations be developed. Also a concern was raised regarding NYSDEC changing a dam's hazard class based on unfounded information submitted by an uninformed person. A comment also stated that the terms in the hazard classification definition were unclear or subjective.

These comments 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 reprints below the May 2009 Frequent Comment #3 which states in its entirety:

Many comments were made about hazard classifications. Specifically, several individuals and associations stated that the regulations should specify the methods and procedures that the NYSDEC will use when determining whether a hazard classification will be changed. Also, that it was unfair to include downstream development as a criterion in assigning a hazard classifications to a dam, because doing so forces upstream dam owners to bear the costs of poor development choices, many of which are made after the dam is constructed and without the input or control of the upstream dam owners themselves. Several individuals and associations expressed concern that the regulations lack any mode of appeal once classifications have been made. Some commenters stated that a Class D hazard classification was inappropriate or unnecessary.

**Response:**

Hazard classifications were discussed extensively in the response to Frequent Comment #3 in the May 2009 Assessment of Public Comments, which states, in its entirety:

The proposed dam safety regulations do not reflect any significant language changes regarding hazard classifications, but a dam's classification now carries more significance as a result of the safety requirements that are associated with each particular hazard classification. By its nature, the hazard classification of a dam must reflect changes to potential impacts from a dam failure, including, for instance, those due to increases in development downstream of the dam.

The NYSDEC reviewed the proposed hazard class definitions, and those used by other states and federal agencies. NYSDEC's hazard class definitions are consistent with those of other dam safety organizations. NYSDEC removed some of the subjective terminology in the revised hazard classification language in favor of more objective standards. However, the regulatory language with respect to hazard classifications must allow for the wide array of specific characteristics of each dam and its locale. Hazard classification determinations are and must remain subject to the dam safety engineering discretion of NYSDEC staff.

The assignment of a hazard classification can require a variety of engineering assessment techniques, as well as significant engineering judgment. This issue may be further tackled in technical guidance documents, and NYSDEC intends to pursue this further during our planned review of the "Guidelines for Design of Dams."

NYSDEC acknowledges that development downstream of a dam may result in a more severe hazard classification for the dam, and the imposition of a correspondingly increased compliance burden.

The language providing dam owners the right to appeal NYSDEC's hazard classification, which exists in the currently effective regulation, has been added to the revised rule making. A dam break analysis may be provided with such a request for review, which is generally defined in the revised rule making, and may be performed using a number of methods, depending on the site specific characteristics of the dam and its locale.

There also exist several opportunities, formal and informal (including those under Article 78 of the New York Civil Practice Law & Rules), for dam owners to appeal their hazard classifications.

Hazard Class D was added to more accurately reflect NYSDEC's current practice. The revised dam safety regulations do not impose requirements on owners of Class D dams, however, NYSDEC may retain records.

The dam safety program generally considers the downstream damages of the dam when establishing the hazard classification. NYSDEC, under subpart 673.5(d), will be required to notify the dam owner in writing and provide the basis for a change in hazard classification. Pursuant to subpart 673.5(d), NYSDEC will provide the basis for assigning a hazard classification and a dam owner may challenge NYSDEC's stated rationale pursuant to subpart 673.5(e). It is NYSDEC's practice to seek verification of information provided by third party sources.

**Frequent Comment #4:**

Several comments concerned engineers. Comments expressed concerns with the definition of “engineer,” whether an engineer possesses the qualifications to perform dam safety work, the need for 10 years of related experience to inspect high hazard dams, and the use of qualified individuals who are not NYS licensed engineers to perform dam safety inspections and/or develop EAP’s. One commenter requested that the use of certain employees and conservationists who have the ability to perform the engineering work for a farm pond, as provided for in NYS ECL §15-0503(4), be included in the definition of an “engineer”.

A comment suggested that the DEC should provide criteria so the owner could determine if an engineer is competent or the DEC itself should assess the competencies of the engineers who want to work on dam projects in New York State and provide this list to dam owners.

These comments 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 reprints below the May 2009 Frequent Comment #4 which states in its entirety:

Several comments focused on engineers. First, the State should maintain a list of approved engineers. Second, the requirement that engineers have ten years of specific experience is arbitrary and unreasonable, and may not even provide enough engineers for the job as few engineers meet this requirement. Also, there is concern as to whether the NYSDEC itself will need to meet these requirements, whether it would be able to meet these requirements and if not, what the added costs would be to the taxpayers to bring NYSDEC into compliance.

(SAPC Comments I-1.1, I-5.5, G-12.1, G-12.2, G-12.3, G-15.10, G-15.15, L-3.18, L-3.34, S-1.8, S-1.13)

**Response:**

Please see the Response to Frequent Comment #4 in the May 2009 Assessment of Public Comments, which states, in its entirety:

NYSDEC does not believe it would be appropriate for the State to maintain a list of approved engineers, and does not intend to do this.

Even if a qualified list were created, commenters mistakenly assumed this would mean the engineer’s work would automatically be accepted.

Modern state dam safety programs were created after the failure of dams built by highly qualified engineers. One of the fundamental activities of the program is to provide additional safety through critical review of all significant work on dams, regardless of the design engineer's qualifications.

The requirement for an engineer to have 10 years of experience has been removed from the revised rule making. State Education Law already bars engineers from practicing outside their area of expertise, and this principal has been clarified with a revised definition of "engineer."

There are several resources available to identify qualified consulting engineers, including those from the Association of State Dam Safety Officials (ASDSO), which publishes a directory of industry contacts and a brochure on how to procure engineering services.

The revised rule making clarifies the components of a dam safety program that require the services of an engineer. These modifications better specify the intended requirements for consulting engineers.

NYSDEC staff experience is not relevant to the regulations, but many of the engineers in NYSDEC Dam Safety Section have 10 or more years of relevant experience.

To answer the issue relative to conservationists who have the ability to perform the engineering work for a farm pond being used in lieu of an engineer, NYSDEC adds the following, which is taken from the Response to Frequent Comment #2 in the May 2009 Assessment of Public Comments:

In the permitting (versus safety) provisions of ECL Title §15-0503(4), the design of farm ponds or certain improvements thereto, may be prepared by an engineer or conservationist employed by a governmental agency cooperating with a soil conservation district, or by an engineer employed by the NYSDEC. A conservationist is generally employed by the Natural Resource Conservation Service, but is only allowed to design dams that are below the Revised Part 608 permit applicability size thresholds. The statute does not allow submittals by a (county) Conservation District employee who is not an engineer, and did not contain such allowance prior to the 1999 revisions. The applicability thresholds in Part 608 have been raised so that dams on which conservationists could have worked, are now largely exempt from permit and the vast majority of Revised Part 673 requirements, other than recordkeeping and inspection and maintenance. Therefore, the farm pond provision is no longer needed, and has been removed from Revised Part 608.

The responsibility of retaining an engineer is with the owner, who may show the cited regulatory provision to a prospective engineer and request the engineer identify whether the individual engineer or engineering firm possesses sufficient specific education, training, experience and competence to complete the specified project in a manner that complies with the dam safety statute and these revised regulations.

**Frequent Comment #5:**

Many comments concerning 673.1(j), the definition of 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 reprints below the May 2009 Frequent Comment #5, which states in its entirety:

Many comments were directed towards Part 673.1(j) of the proposed dam safety regulations. This provision defines “dam owner” and concludes by adding into the definition any person or local public corporation that “uses a dam.” Commenters noted that this definition is broad, and may include more into the category of “dam owner” than the NYSDEC intends. Commenters also stated the “dam owner” definition will also create problems with enforcement, as many “dam owners” will be difficult if not impossible to identify and locate. There were also comments regarding the lack of opportunity for other interested parties to have influence in NYSDEC’s decisions about a dam, and questions as to how transfer of ownership would affect liability.

A commenter expressed the feeling the definition is so broad that it means the State is considered a user of the dam and, therefore, an owner of every dam in the state. Others expressed that if the State owns property on the impounded waters, the State is considered an “owner” under the regulations.

A commenter stated that since State Public Benefit Corporations hold property in the name of the people of the State of New York, the dams under the jurisdiction of the State Public Benefit Corporation should be identified as being owned by the State of New York.

(SAPC Comments I-2.2, I-5.21, G-4.1, G-5.2, G-3.2, G-3.3, G-3.8, G-4.3, G-8.1, G-12.5, L-2.5, L-3.20, S-2.1, S-2.2, S-2.5)

**Response:**

Please see the response to Frequent Comment #5 in the May 2009 Assessment of Public Comments, which states, in its entirety:

The definition of “owner” is not new. The definition of owner in the proposed dam safety regulations simply adopts the long-existing statutory definition of dam owner.

A new property transfer provision in the revised rule making should help clarify the transition of statutory and regulatory dam safety liability upon the transfer of property, or rights in property, where a dam is located.

Where there are numerous direct users or beneficiaries of a dam (i.e., a lake association or other group organization, incorporated or not, in which members all benefit from or are directly dependent upon a single dam), all such beneficiaries should work together to make sure the dam is operated and maintained in a safe condition. NYSDEC has had and continues to

have the statutory authority to pursue enforcement against any individual or group of these statutory “owners”, who would then need to pursue contribution from the other beneficiaries. It may be in the best interests of groups who use or directly benefit from a dam to work together cooperatively and designate a primary contact with NYSDEC for the purposes of dam safety compliance. The development of cooperative agreements among owners regarding cost sharing, retention of an engineer, the scheduling of work on a dam, and regarding how owners will meet NYSDEC reporting requirements, may reduce litigation or transaction costs among owners and allow for cost savings. Further, the respective owners of several dams on a single water body or of dams that are in close proximity to each other, may choose to work together to explore whether, for example, periodic engineering services may be retained by the owners for multiple sites at more economical rates.

There exist informal and formal opportunities for stakeholders to have influence over the fate of a dam. Most directly, this includes the opportunity to acquire a dam and thereby have total control over any necessary remedial measures. A new provision in the revised dam safety regulations reflects the reality that any individual or entity may submit information for NYSDEC consideration related to the existence, location, condition and safety of any dam. Public participation in the permitting process is addressed, in part, in Part 621.

Also please note that the statutory definition of a dam owner does not include the state or state agencies. See, e.g., ECL § 15-0507 and §15-0107. Environmental compliance requirements for state agencies are governed by the ECL and other state laws and executive orders.

**Frequent Comment #6:**

Some comments indicated that 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. In addition, the financial assurance provisions, if used, should be used only if the dam is “unsafe” or “unsound”. The question of how the State proposed to get the financial assurance if the individual lacked the resources to establish them was raised. In addition, it was expressed that the State paid too much for everything and there was a concern with the state having control of a dam owner’s money.

Additionally, it was stated the regulations should reflect that if a State Public Benefit Corporation owned a dam, no financial assurance should be required. Public entities that are self-insured should be allowed to use a “global” financial security if required to provide financial assurance.

(SAPC Comments I-2.5, I-2.7, G-1.3, G-7.4, G-11.5, S-2.12)

**Response:**

The inclusion of financial assurance as part of a dam safety program was specifically authorized in the 1999 amendments to the dam safety statute (ECL §15-0507). The

Department's discretion is exercised based on all of the facts and circumstances of a dam, which may include, for example, the severity and duration of deficiencies and the compliance record of the dam owner. Under the revised regulations, financial assurance is not required unless a dam is "unsafe," "unsound" or "deficiently maintained", and then, only when requested by NYSDEC. In those instances where financial assurance would be required, it would not actually be invoked or used by NYSDEC unless the owner thereafter has failed or has continued to fail to bring the dam into compliance after having opportunity to do so.

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 (see NYCRR §673.16).

In drafting the language regarding financial assurance, NYSDEC's intent is to be able to get owner commitment to correcting dam deficiencies before they get worse or pose a greater threat to public safety. To provide flexibility, subpart 673.16(i)(2)(ii) includes allowances for a variety of financial assurance mechanisms, including "other" financial assurance mechanisms, which may be accepted on a case-by-case basis, as appropriate.

**Frequent Comment #7:**

Comments expressed concern over the release of information about dams. These comments were largely the same as the comments received during the first public comment period following the Notice of Proposed Rule Making issued on February 13, 2008 and answered in the May 2009 Assessment of Public Comments. NYSDEC reprints below the May 2009 Frequent Comment #12, which states, in its entirety:

There were several comments regarding NYSDEC's release of information about dams. Some comments criticized NYSDEC for not providing enough information. Others expressed concern that submitting information to NYSDEC would make security-sensitive information available under Freedom of Information Law requests.

(SAPC Comments C-1.2, C-1.3, G-10.1, G-13.1, G-18.5, G-13.1, I-3.1, L-3.39)

**Response:**

NYSDEC, as well as municipalities, are subject to New York State Public Officers law and, within it, to the Freedom of Information Law (FOIL). The Public Officers Law defines the types of information that must be released and identifies which information may be withheld from disclosure. Regulations and case law interpret this law. NYSDEC handles requests for information about dams in accordance with this law.

FOIL does allow for the withholding of critical infrastructure information (CII). NYSDEC will consider revising its inspection report format so CII is segregated and identified so that it may more easily be reviewed and, if appropriate, redacted in response to FOIL requests. Communities receiving an inspection report will be directed to withhold the CII.

The statutory requirement for the disclosure of inspection reports by NYSDEC is in ECL § 15-0516. The NYSDEC has also, for the past two years, made a map of inventoried dams available for viewing through its web site. The revised regulations (see NYCRR § 673.5) also include requirements for NYSDEC to provide a list of inventoried dams and their hazard classifications, but not other specifics.

**Frequent Comment #8:**

The comments concerning “ordinary maintenance,” subpart 608.1(v), were largely the same as the comments during the first public comment period following the Notice of Proposed Rule Making issued on February 13, 2008 and answered in the May 2009 Assessment of Public Comments. NYSDEC refers the reader to the May 2009 Frequent Comment #11 which states, in its entirety:

Comment indicated concern with the term "ordinary maintenance". Since all dams are unique in construction, the maintenance that can be completed without a permit should also be unique.

(SAPC Comments G-15.7, G-15.9, L-3.13, L-3.22, L-3.41, S-2.14)

**Response:**

Please see response to Frequent Comment #11 in the May 2009 Assessment of Public Comments, which states, in its entirety:

NYSDEC has attempted to define the term “ordinary maintenance” in Part 608 as precisely as possible, but because dam designs and the specific characteristics of individual dams vary widely, a more precise definition cannot be uniformly applied to all dams in an appropriate manner. In the revised rule making, with respect to Part 608, NYSDEC has provided a definition for “repair” to provide a contrast to “ordinary maintenance.” In addition, since even work that could be considered “maintenance” for the purposes of dam safety may require other permits, NYSDEC has an existing mechanism through which a dam owner may request a determination as to whether proposed work would require permits through its Regional Permit Administrator’s office.

**Frequent Comment #9:**

Comments were concerned with condition ratings (Subpart 673.16). Comments were received about the way in which condition ratings would be applied based on their definitions.

Additionally, comments requested more time to gather information to appeal a condition rating, under subpart 673.16(j), than was allowed in the regulation.

Another comment stated it would be unfair to rate a dam “unsafe” or “unsound” if the owner had not completed the engineering assessment. Another expressed the opinion that NYSDEC must apply a condition rating following an inspection and, if a condition rating is not assigned, the enhanced safety program provisions of §673.16(f) cannot be applied.

Finally, a comment stated the term “condition rating” should be defined in the definitions section of the regulation, subpart 673.2.

(SAPC Comments, G-1.2, G-11.4, C-2.4, L-3.41, L-3.43)

**Response:**

NYSDEC reviewed the condition ratings. NYSDEC agrees the word “minor” in subpart 673.16(b)(3) could create confusion and is removing it from the subpart. Subpart 673.16(b)(3) now, in part, reads “‘Deficiently maintained’: dams with physical or operational deficiencies which do not require further significant engineering analysis.” In addition, Subpart 673.16(b)(4) has been changed to read “‘No deficiencies noted’: A Safety Inspection or Engineering Assessment, and/or investigation by NYSDEC, did not reveal *deficiencies*.”

NYSDEC has reviewed subpart 673.16(j) and finds it to be appropriate as drafted. The assignment of a Condition Rating (of 'unsafe', 'unsound' or 'deficiently maintained') serves as a notice of violation to the dam owner. As a matter of public safety, if a dam owner believes NYSDEC's assignment is arbitrary or capricious, the owner must let NYSDEC know promptly or else focus on bringing the dam into compliance.

NYSDEC’s discretion with respect to condition ratings is exercised based on all of the facts and circumstances of a dam, which may include, for example, the severity and duration of the deficiencies and the compliance record of the dam owner. This also applies to NYSDEC’s assigning a condition rating of “Unsafe” or “Unsound” to a dam when an engineering assessment has not been completed. Accordingly, Subpart 673.16(b)(2) is similar to a long-standing national practice of requiring a positive safety demonstration for certain dams, which began under the Army Corps of Engineers Phase I Inspection program.

NYSDEC does not agree that the term “condition rating” should be defined in subpart 673.2. This regulatory term is set forth in its respective subparts as the term is detailed and relatively lengthy.

**Frequent Comment #10:**

Comments were received regarding Inspection and Maintenance plans pursuant to Subpart 673.6. Comments stated that the plans should be required for fewer dams than proposed (ie: only for Class C and Class B dams), or that the regulations should provide more time to create the plans.

Additionally, a commenter wanted the regulations to clarify that under Subpart 673(b), the dam owner establishes the schedule and designates the individuals responsible for circulation of notification of deficiencies and potential deficiencies, and for establishing the schedule for monitoring, inspections and maintenance.

(SAPC Comments I-1.10, I-2.3, G-12.8, G-12.9, L-3.28, L-3.29, S-2.10)

**Response:**

The department has reviewed subpart 673.6 and determined it appropriately expresses the intent of the Department to require that owners to develop Inspection and Maintenance Plans for dams exceeding the permitting size thresholds, dams that have a "B" or "C"

hazard classification, or dams that pose a threat of personal injury, substantial property damage, or environmental damage develop an Inspection and Maintenance Plan.

The threat posed by any dam exists independent of whether or not the dam has been assigned a Hazard Classification or a Condition Rating. The basic requirements to inspect and maintain a dam and document the procedures for doing so are reasonable and necessary for every dam. The inspection and maintenance requirement for all dams is less stringent than the FEMA Model State Dam Safety Program, which recommends that low hazard dams receive engineering assessments every five years.

Twelve months is adequate for the development of an Inspection and Maintenance Plan for any dam. Guidance has been and continues to be available in NYSDEC's guidance document entitled, "An Owner's Manual for the Inspection and Maintenance of Dams in New York", available on the Department's website ([www.dec.ny.gov](http://www.dec.ny.gov)). Updated guidance and a template are being developed. However, there is no need to await their issuance prior to timely developing an Inspection and Maintenance Plan.

The Department has reviewed the language of Subpart 673.6. Subpart 673.6(a) identifies that it is owners of dams who prepare Inspection and Maintenance Plans. Subpart 673(b) identifies the elements thereof.

**Frequent Comment #12:**

Comments were received referencing the Governor's Executive Order 17 of April 27, 2009 (EO 17) and the issue of "unfunded mandates." EO 17 requires an assessment of formalized proposals of legislation or regulations. The assessment is to evaluate mandates on local governments which increase costs or have the effect of raising property taxes. Comments expressed the view that the Dam Safety program should investigate the potential cost of the required inspections, reports, financial assurance, and potential dam modifications needed for updated worst case floods. Many expressed the thought that the revised proposed rule making amounts to an unfair mandate upon the private and municipal dam owners and shifts NYSDEC's governmental responsibility for inspections of dam infrastructure to the dam owner. Additionally, one commenter stated that they oppose any new regulations which results in the cost falling back onto the local property tax.

(SAPC Comments G-3.6, G-5.5, G-11.3)

**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 a dam are not new or newly shifted to dam owners and do not originate with this rule making. The potential costs which may be imposed on some dam owners by the amended regulations, were estimated and appear in the published Regulatory Impact Statement of February 2008 in this rule making.

The express terms of the Executive Order apply to local governments rather than to private entities, and only to increases in costs imposed by the revised regulations, if any, associated with the operation and maintenance of a dam in a safe condition.

Regarding the costs of compliance for a dam whose hazard classification has changed, or regarding the costs for upgrading dams to meet modern technical standards, these comments are beyond the scope of the proposed regulations and their implementing statute. The duty to maintain a dam with a Hazard Classification that has changed due to downstream development is longstanding and has not been altered by this rule making. The costs to do so are not new and need not be estimated (even if it were possible to do so, given the variety of dams and dam structures) pursuant to the cost estimate obligations of the rule making process.

**Frequent Comment #13:**

There are comments concerning “breach” of a dam (defined in Part 673.2(c)). Comments noted that the definition includes only planned construction or operational activities and does not include “unplanned” breaches. Another comment asked if a permit would be required every time the normal impoundment level is lowered, even if temporarily, when proper dam management may require it (such as to set seasonal water levels). One comment asked that the definition be further clarified by stating that breach would result in the dam’s inability to impound water under normal conditions.

(SAPC Comments, G-17.4, I-5.4, L-3.1, L-3.15, S-1.5)

**Response:**

Part 673.2(c) has been reviewed and modified as follows: 'Breach' of a dam means 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:**

Comments discussed the definition of the height of a dam (Part 673.2(n)) as the vertical dimension from the downstream toe of the dam at its lowest point to the top of the dam. It was expressed that the highest point of the dam should be the height of the spillway or the raceway. It was also suggested that the “lowest point” be defined in terms of the pre-dam topography. It was also suggested that NYSDEC consider using US Army Corps of Engineers and FEMA definitions for hydraulic height, structural height, etc.

(SAPC Comments I-1.9, G12.4, G-15.3, L-3.2, S-1.1, S-1.9)

**Response:**

NYSDEC considered U.S. Army Corp and FEMA provisions, including definitions, during the course of this rule making, as well as the provisions of many states. The 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. The definition of 'Height' is consistent with that in many other states.

NYSDEC has conformed the definition of height in 608.1(n) to that in 673.2(n). Subpart 608.1(n) has been modified to be consistent with Subpart 673.2(n). Subpart 608.1(n) now

reads “Height, with respect to a dam, means the measurement of the vertical dimension from the downstream toe of a dam at its lowest point to the top of the dam.”

**Frequent Comment #15:**

Subpart 608.1(q) and 673.2(r) both define the term “Maximum Impoundment Capacity.” Several comments requested clarifying language by adding “including during periods when a temporary surcharge pool exists” to the definition. Others expressed the opinion that the definition did not make sense because a properly designed dam would never have to impound waters to the top of the dam. A commenter also stated “change the term ‘maximum impoundment capacity’ to the term ‘normal pool impoundment capacity.’ The use of the term ‘normal pool’ will make this definition consistent with DEC's use of this term in Part 673.13(e).”

(SAPC Comments I-2.1, L-3.5, L-3.11, L-3.21, S-1.2, S-1.10)

**Response:**

Subparts 673.2(r) and 608.1(q) have been reviewed and are appropriate as drafted. The term "maximum impoundment capacity" is statutory, and has been carried into the size thresholds of the revised regulations as appropriate. See ECL §15-0503. The 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.

The proposed definition is not a significant change from current regulations, current NYSDEC practice, and the laws, regulations, and practice of many other state and federal agencies. NYSDEC believes the proposed language is appropriate.

The definition of maximum impoundment capacity is consistent with federal guidance—see the Bureau of Reclamation's Glossary, <http://www.usbr.gov/library/glossary>. The spillway's elevation determines what is known as the normal impoundment capacity. However, NYSDEC does not intend to incorporate "maximum impoundment capacity" into the new definitions of "Small" and "Large" Class C dams (see subpart 673.13(e)), which simply govern the time deadlines for submitting the initial Engineering Assessment Report.

## V. List of Comment Sources

Letter Code	Last Name	First Name	Affiliation	Date Submitted	Form Submitted	Individual Comments
I-1	Lake	Donald		5/25/2009	E-mail	I-1.1 – I-1.12
I-2	Kunzman	John M.		6/12/2009	E-mail	I-2.1 – I-2.8
I-3	Hallock	Geraldine		6/14/2009	E-mail	I-3.1 – I-3.2
I-4	Guercio	John		6/8/2009	E-mail	I-4.1 – I-4.1
I-5	Mouillesseaux-Kunzman	Heidi		6/19/2009	E-mail	I-5.1 – I-5.22
I-6	Baker	Trudy		6/15/2009	Mail	I-6.1 – I-6.1
I-7	<a href="mailto:abcdef1_2@netzero.net">abcdef1_2@netzero.net</a>			6/19/2009	E-mail	I-7.1 – I-7.1
G-1	Weber	William A.	Keuka Lake Outlet Compact, Chairman	6/19/2009	Fax	G-1.1 – G-1-4
G-2	McDonnell	Susan	Westchester Lake Property Owners Association	6/9/2009	E-mail	G-2.1 – G-2.6
G-3	Keats	Roy	Garnet Lake Civic Association; Member	6/11/2009	E-mail	G-3.1 – G-3.8
G-4	Manning	Robert E.	Garnet Lake Dam Committee	6/12/2009	E-mail	G-4.1 – G-4.3
G-5	Doing Hogan	Rena M. James	PRLOA and NYSFOLA Board of Directors	6/11/2009	Mail	G-5.1 – G-5.7
G-6	Rivers	Bob	Warners Lake, East Berne	6/18/2009	E-mail	G-6.1 – G-6.1
G-7	Opp	John P.	Melody Lake Assoc. of Cortland County, Inc.	6/15/2009	Mail	G-7.1 – G-7.4
G-8	Rosati	Robert	NYSFOLA	6/15/2009	Mail	G-8.1 – G-8.5
G-9	Collings	Art	Dutchess Land Conservancy; Vice President	6/18/2009	E-mail	G-9.1 – G-9.1
G-10	Donohue	Gavin J.	IPPNY	6/19/2009	E-mail	G10.1 – G-10.1
G-11	Creighton	James F.	Fallsburg Fishing & Boating Club	6/19/2009	E-mail	G11.1 – G-11.8
G-12	Tauzel	John R.	New York Farm Bureau	6/19/2009	E-mail	G12.1 – G-12.10
G-13	Adsitt	Jim	DeRuyter Lake Association	6/19/2009	E-mail	G13.1 – G-13.5
G-14	Baynes	Peter A.	NYS Conference of Mayors and Municipal Officials	6/19/2009	E-mail	G-14.1 – G-14.4
G-15	Buhrmaster	L.H.	Galway Lake Camper Assoc.	6/19/2009	E-mail	G-15.1 – G-15.16
G-16	Wilson	Mark	Lake Placid Shore Owners' Assoc.	6/17/2009	E-mail	G-16.1 – G-16.3
G-17	Lindloff	Stephanie	American Rivers	6/19/2009	E-mail	G-17.1 – G-17.11
G-18	Shaffer	Gail	Dam Concerned Citizens, Inc.	6/19/2009	E-mail	G-18.1 – G-18.5
S-1	Blair, PE	Jane W.	NYS Board of Engineering and Land Surveying	6/19/2009	E-mail	S-1.1 -- S-1.14
S-2	Waite, PE	Christopher	NYS Thruway Authority/NYS Canal Corporation	6/19/2009	E-mail	S-2.1 – S-2.17
L-1	Randy	Preston	Town of Wilmington, Supervisor	6/15/2009	E-mail	L-1.1 – L-1.1
L-2	Mark	Watts	Chemung County Soil & Water Conservations District, District Manager	6/18/2009	E-mail	L-2.1 – L-2.5
L-3	Rush	Paul V.	NYCDEP	6/19/2009	E-mail	L-3.1 – L-3.43
C-1	Auser	Jeffrey	Brookfield Renewable Energy	6/16/2009	Mail	C-1.1 – C-1.4
C-2	Slade	William	Consolidated Edison	6/19/2009	E-mail	C-2.1 – C-2.4

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## VI. COMMENT AND RESPONSE INDEX

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**The Comment and Response Index** contains a complete listing of all comments and NYSDEC's responses. The index allows readers to find answers to specific questions they have raised and is organized as follows:

- The first column lists the name of the individual or entity that submitted the comment.
- The second column identifies the alphanumeric file code assigned to each comment (e.g., G-11.3, I-3.2, etc.)
- The third column provides a summary of the comment.
- The fourth column provides the response to the comment or a reference to see responses to frequent comments.

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Example:

<b>Name/Organization</b>	<b>Comment Code</b>	<b>Content Summary</b>	<b>Response</b>
S. Abel	I-1.3	Will an earthen dam be held to the same requirements as a concreted dam?	

In a few instances, the name of an individual or entity may appear in the Comment and Response Index more than once, because he or she sent more than one written comment. An individual who commented on behalf of a group and then in his or her own name (or vice-versa); will find that these submissions were coded separately and that each appears in the Comment and Response Index.

It was not always clear if an individual made comments on his or her own behalf or on behalf of an organization. The reader is advised to examine both the group (G) listing for the name of the group, firm, or association used on the letterhead of a written submission and the individual (I) listing for his/her own name.

Line #	Name/Organization	Comment Code	Comment Summary	Response
1	Jeffrey Auser, Brookfield Renewable Energy	C-1.1	Concerned that there may be duplicative permitting efforts, as well as potentially contradictory and conflicting dam design and stability criteria, and hazard classification. While Brookfield fully supports and encourages the DEC's involvement in the Dam Safety process of FERC licensed and license exempted dams, it is imperative that the DEC's Program complements, rather than competes with, what is currently in place under the <u>FERC'S time tested Program</u>	The regulatory authority of the NYSDEC and the Federal Energy Regulatory Commission (FERC) are each governed by their respective statutes and case law. The revised dam safety regulations do not change these authorities. The revised dam safety regulations provide flexibility for dams regulated by other government agencies.
2		C-1.2	Concerned with the proposed regulations requirement that dam safety inspection reports for intermediate and high hazard dams be provided to officials of the municipality in which the dam is located within 30 days. This type of documentation contains highly sensitive information that is deemed Critical Energy Infrastructure Information (CEII) by the FERC and not available to the public under the Freedom of Information Act. These CEII designated documents are only released upon submittal of a Non-Disclosure Agreement and a thorough review by the Commission	Please see response to Frequent Comment #7.
3		C-1.3	Concerned that Engineering Assessments, Inspection and Maintenance Plans, Safety Inspections, Permit Applications (and supporting engineering data) and other sensitive documents that the state may receive in accordance with the proposed regulations, and designated by FERC as CEII, will not be properly controlled. The proposed regulations should state that these documents will be controlled and managed so as to prevent uncontrolled distribution of these materials, Without addressing this issue we have serious concerns about the State's and Municipality's ability to comply with these regulations and properly protect and control this highly sensitive information	Please see response to Frequent Comment #7.
4		C-1.4	During a meeting with Brookfield on April 2, 2008, there appeared to be some confusion concerning the term "License Exemption." License Exemption means that the particular site is exempt from any future relicensing requirements, exempt from the requirements of Part I of the Federal Power Act. Exemptions are issued in perpetuity. However exempted projects are subject to the mandatory terms and conditions set forth by federal and state fish and wildlife agencies and are subject to the FERC's Dam Safety Requirements.	This comment is beyond the scope of the proposed regulations and their implementing statute. FERC exempted projects are, by New York statute, subject to NYS's dam safety permitting and dam safety requirements.

Line #	Name/Organization	Comment Code	Comment Summary	Response
5	William Slade, Consolidated Edison	C-2.1	<p>§673.2(k), creates unnecessary confusion in defining "engineer". Proposed paragraph (l) requires a "professional engineer licensed and registered to practice engineering under Article 145 of the Education Law of the State of New York". However, proposed §673.2(k)(ii) adds the additional requirement for "sufficient specific education, training and experience necessary to exercise professional judgment..."; this additional clause creates an uncertainty as to how a dam owner should evaluate the appropriateness of a specific professional engineer. DEC has further confused this subject by introducing the term "professional engineer" for the first time in proposed §673.13(c) as a requirement for engineering assessments. Recommends that DEC eliminate §673.2(k)(ii), and use the term "engineer," as defined in §673.2(k)(i), consistently throughout the proposed regulation.</p>	<p>Where the word "professional" appears, other than in the definition of "engineer", it is provided simply for convenience by repeating part of the definition.</p>
6		C-2.2	<p>Proposed §673.5 fails to require DEC to assign a hazard classification to a particular dam, stating only that "the department may assign a Hazard Classification...". Without a specific hazard classification, a dam owner has no way to identify its compliance requirements. The proposed rule should be modified to state "the department shall assign a Hazard Classification..."; the proposed rule should also mandate a specific time frame following the finalization of the proposed rule by which the DEC must assign a hazard classification to all dams in the State.</p>	<p>It has been and continues to be the obligation of each dam owner to operate and maintain a dam in a safe condition whether or not a Hazard Classification has been assigned. Size also triggers regulatory applicability.</p>
7		C-2.3	<p>Proposed §673.16 deals with assignment of a Condition Rating. Here again, the proposed rules are tentative, stating in §673.16(a) only that "the Department may assign a Condition Rating..." Inasmuch as one of the Conditions Ratings allowed to DEC is "no deficiencies noted," the DEC should be required to assign a rating if an inspection is made. Recommends that the language of proposed §673.16(a) be modified to state, "Based on its investigation, the department shall assign a Condition Rating to any dam." If DEC elects to retain the use of the word "may" in the first sentence, should add a second sentence to §673.16(a) stating, "If the department elects not to assign a Condition Rating to any dam, the provisions of §673.16(f) shall not apply as of the date of its investigation".</p>	<p>Please see above response. In addition, Subpart 673.16(f) is, by its terms, conditioned upon the assignment of a Condition Rating.</p>

Line #	Name/Organization	Comment Code	Comment Summary	Response
8		C-2.4	Proposed §673.16(j): CEI offers the following alternate language: A dam owner may contest the department's assignment of or change to a Condition Rating. Within 30 days of the date of the department's notice, the dam owner must send to the department's Dam Safety Section, a request for review of the Condition Rating, and must accompany the request with a date-specific schedule for submittal of specific engineering documentation to support a different Condition Rating. The Director of the department's Division of Water, or duly authorized designee, will review the request and the schedule for submittal of additional documentation and issue a written decision either denying the request, modifying the proposed schedule for additional documentation, or changing the Condition Rating.	Please see response to Frequent Comment # 9.
9	William A. Weber, Chrm., Keuka Lake Outlet Compact	G-1.1	Concerned about the cost of insurance premiums. Suggests DEC should: 1) Examine the possibility of waiving this requirement; 2) Examine the downstream flood damage that may have occurred in June 1972; 3) Analyze the real hazard based on the inundation report, which will be available in the EAP document this summer.	Please see response to Frequent Comment #1.
10		G-1.2	The proposed regulations [673.16(b)(2)] states: "Hazard Class "B" or "C" dams for which there is no demonstration that the spillway capacity and stability are adequate may receive a condition rating of "unsound." It is not reasonable to place Class "B" or Class "C" dams in the "unsound" category where the owners of the dams have not yet completed the analysis needed to demonstrate the dam's stability or spillway adequacy and thus impose upon those dam owners the heavy burden that these regulations stipulate. The subject dams should not be automatically classed as "unsound". The language of this section should be clarified.	Please see Frequent Comment #9.
11		G-1.3	Section 673.16(b)(4)(f) indicates that for dams that have been deemed to be "unsafe", "unsound" or "deficiently maintained" DEC may require the owner to implement an "Enhanced Safety Program". One potential measure stated for an "Enhanced Safety Program" is the requirement for the owner to provide "financial assurance." The effect of this requirement can be extremely punitive. Therefore, the provision for potentially requiring financial assurance should either be removed or the regulations should better define the extremely rare circumstances where this requirement could apply.	Please see Frequent Comment # 6.

Line #	Name/Organization	Comment Code	Comment Summary	Response
12		G-1.4	Section 673.5(f) states that, "Any person may provide to the department, and the department shall consider, information relevant to the assignment of a Hazard Classification to a dam." Should a person other than the owner submit information that could affect the potential Hazard Classification of the dam, there should be explicit provision in these regulations that such information will be disclosed to the owner for the owner to address before DEC makes a ruling regarding the information. Dam owners need due process should an uninformed person or a person with nonpublic safety issues submit unfounded claims affecting hazard classification.	Please see Frequent Comment # 3.
13	Gavin J. Donohue, IPPNY	G-10.1	IPPNY is concerned about the provisions that require the DEC to distribute FERC CEII to municipalities without any apparent sort of control mechanism. The revised draft regulation needs to be amended further to account for the provisions of existing law. Section 713 of the NYS Executive Law provides that the owners/operators of energy generating facilities are required to provide access to the Director of Public Security to audits/reports regarding such critical infrastructure; provided, however, that exclusive custody and control of such audits/reports must remain solely with the owners and operators of such energy generating facilities. Section 89 of the NYS Public Officers Law provides that a person or entity who submits or otherwise makes available any records to any agency, may, at any time, identify those records or portions thereof that may contain critical, infrastructure information, and request that the agency that maintains such records exclude such information from disclosure.	Please see response to Frequent Comment #7.
14	James F. Creighton, Fallsburg Fishing & Boating Club	G-11.1	Concerned that this revised proposed rule making amounts to an unfair mandate upon the private and municipal dam owners in New York to shift governmental responsibility for inspections of dam infrastructure - including the requirement to hire expert engineers on a frequent basis - without providing any funding mechanism to pay for that mandate.	Please see response to Frequent Comment #1.
15		G-11.2	It is imperative that either the DEC itself provide a funding mechanism for such engineering studies or delay implementation of the revised proposed regulations to allow the legislature to provide such funding assistance.	Please see response to Frequent Comment #1.

Line #	Name/Organization	Comment Code	Comment Summary	Response
16		G-11.3	The Governor's Executive Order 17 requires a complete assessment of all unfunded mandates. The DEC should investigate the potential cost of the required inspections, reports, financial assurance, and potential dam modifications which are required under the revised proposed rule making, and the same should be reported to both the Governor and to <del>dam owners before this rule making takes effect.</del>	Please see response to Frequent Comment #12.
17		G-11.4	Concerned with the Condition Ratings set forth in §673.16. This lumps together "Unsafe" and "Unsound" dams with dams that receive a "Deficiently Maintained" condition rating. It appears that since the only other condition category is "No Deficiencies Noted," there may be a tendency to identify something as requiring adjustment, change or attention, no matter how small or relatively insignificant. Nevertheless, based upon the definitions, financial assurances could still be required even where the DEC has only noted "minor physical or operational deficiencies" that often only require "increased maintenance." The revisions should not allow for financial <del>assurances to be required for such minor items.</del>	Please see response to Frequent Comment #9.
18		G-11.5	DEC should only invoke the extreme requirement of provision of financial assurance in the case of dams that are given an "Unsafe" or "Unsound" condition rating.	Please see response to Frequent Comment #6.
19		G-11.6	DEC has not responded to our comments made during the initial public comment period with respect to any efforts to minimize the numbers of landowners who might attempt to build within inundation areas. DEC should propose rules restricting further development in inundation areas or to require such landowners who do so to contribute toward a public safety fund to help defray the costs to be incurred by the dam owner for inspections, improvements and emergency action required under the revised proposed regulations.	NYSDEC provided a response in May 2009 (see response to Frequent Comment #3 in the Assessment of Public Comments that accompanied the revised rulemaking).
20		G-11.7	Requests that the DEC reconsider its revised proposed regulations and rules and to take the necessary time to study the dire financial impacts this proposed rule making will have. It is not adequate to suggest that legislative solutions to the affordability issue (via grants, etc.) should be sought after the <del>new rules are in place.</del>	Please see response to Frequent Comment #1.

Line #	Name/Organization	Comment Code	Comment Summary	Response
21		G-11.8	The public comments provided to date have demonstrated that the Negative Declarations concerning the proposed rule making are clearly erroneous and that this action will have substantial environmental, economic, social and health impacts. DEC should reconsider its refusal to prepare the necessary Environmental Impact Study required under SEQRA and perform the studies that the DEC should have willingly <u>embraced from the outset</u>	Noted. The Department provided a response in May 2009 (see the response to Frequent Comment #9 contained in the Assessment of Public Comments that accompanied the revised rulemaking).
22	John R. Tausel, New York Farm Bureau	G-12.1	While the wording utilized in §673.2 generally codifies the existing understanding of a licensed "engineer," the establishing statute regarding permitting of dams [NYS ECL §15-0503(4)] specifically provides certain employees and conservationists the ability to also perform the work necessary to ensure the appropriate establishment, operation and maintenance of dams incorporated as part of a farm pond. Reference to this provision needs to be included in the regulations.	Please see response to Frequent Comment #4.
23		G-12.10	NYFB continues to have overall concerns about the enacting statute, particularly in its lack of risk recognition. We are strongly supportive of legislative initiatives to remove the burden of regulating low-risk farm ponds from DEC so that agency resources can be focused on high-risk dams. Additionally, we continue to believe that issues outside of the scope of these regulations, including downstream development, need to be addressed as part of a policy context.	Noted.
24		G-12.2	Recommend amending recognition of qualified professionals to include an engineer or conservationist employed by a governmental agency cooperating with a soil conservation district and operating with appropriate job approval authority and employing agency authorization. This will ensure that the <u>regulations are consistent with enacting statute.</u>	Please see response to Frequent Comment #4.
25		G-12.3	Recommend amending the remaining regulations in a manner that reflects the ability of certain engineers and conservationists to work on farm pond dams (assuming operating with proper authority). One example of this is that 6 NYCRR §608.6 discusses the need for an engineer stamped dam construction plan. This should be revised to recognize any future changes in operating authority by qualified engineers and conservationists.	Please see response to Frequent Comment #4.

Line #	Name/Organization	Comment Code	Comment Summary	Response
26		G-12.4	Disagrees with DEC's definition that the top point of measurement should be the highest point of the dam. Rather height should be based on the vertical dimension from the downstream toe of the dam to the highest point of the impounding structure. In some cases the majority of a dam could be a certain height, however the actual impounding structure (the raceway for example) is several feet lower than the general dam wall. In such scenarios, the water level will not exceed the height of the raceway, making that level the effective highest point of the dam. Using that point would better reflect the risk category of the dam.	Please see response to Frequent Comment #14.
27		G-12.5	The definition of owner [6 NYCRR §672.2] should be clarified to focus on any person who is ultimately responsible for the construction or reconstruction, removal, etc. of a dam, rather than anyone who uses a dam.	Please see response to Frequent Comment #5.
28		G-12.6	NYFB is strongly supportive of proposed provision 6 NYCRR §673.3(j) regarding the ability of DEC to allow time frame extensions due to financial hardship.	Noted.
29		G-12.7	It is our understanding that the proposed regulations dealing with hazard classifications (6 NYCRR §673.5) have been modified significantly. Specifically, rather than have individual owners classify existing dams, it will generally fall to DEC to make a determination on dam hazard classification. The one exemption to this would be where a permit for dam modification has been requested. NYFB is strongly supportive of this altered approach, including the ability of landowners to appeal DEC's hazard classification. These provisions significantly reduce the burden on the vast majority of dams, including farm pond dams, which are low risk and do not pose a concern to public health and safety.	Noted.
30		G-12.8	Regarding the proposed applicability of 6 NYCRR 673.6, we do not concur that those dams above the permitting threshold should be required to maintain an inspection, operation or maintenance plan. Since these dams have not been classified as either a class "B" or "C" dam, they pose little risk of failure. Regulatory requirements should be based on risk. Dams classified as class "A" dams pose little risk and therefore, regardless of size, should be exempt from the regulatory framework. Provision (3) of the applicability paragraph is redundant since dams posing significant risk to the environment and public will already be classified as either a class "B" or "C" dam and covered under this provision.	Please see response to Frequent Comment #10.

Line #	Name/Organization	Comment Code	Comment Summary	Response
31		G-12.9	Generally supports the amendments made regarding a focus on specific maintenance and inspection schedules for individual dams, as opposed to regulatory required schedules.	Noted.
32	Jim Adsitt, DeRuyter Lake Association	G-13.1	The concept of having these reports public pursuant to Public Officers Law should be considered and approved by the <u>Department of Homeland Security for obvious reasons.</u>	Please see response to Frequent Comment #7.
33		G-13.2	The costs should be borne by the state as a whole via a bond issue. Rationale is that all of the public benefits by the waters of NYS. At a minimum, DEC should be a willing partner in sharing the costs associated with the implementation of these <u>regulations.</u>	Please see response to Frequent Comment #1.
34		G-13.3	673.5(a)(3)(iii) hazard classifications. (iii) economic loss; Add the following: including but not limited to economic loss to property owners surrounding the shoreline (riparian) of the impounded waters of said dam and the loss to the county and <u>township tax base.</u>	Please see response to Frequent Comment # 3.
35		G-13.4	(iv) damage to natural resources; Add the following: Including but not limited to the Natural resources of the surrounding <u>shoreline</u>	Please see response to Frequent Comment #3.
36		G-13.5	673.14 and 673.15 is retaining for DEC the ability to inspect and report and take action. This is duplicative. Perhaps the DEC could perform these tasks on their own.	NYSDEC respectfully disagrees. Subpart 673.14 reflects NYSDEC's authority to enter upon the lands and waters to perform a Field Inspection of a dam. Subpart 673.15 reflects NYSDEC's authority to enter upon the lands and waters to undertake a more thorough 'investigation' of a dam or cause an owner to undertake the work, including the more thorough Safety Inspection or Engineering Assessment.
37	Peter A. Baynes, NYS Conference of Mayors and Municipal Officials	G-14.1	Concerned that the regulations will have a debilitating fiscal impact on the local governments that own Class C and Class B <u>dams.</u>	Please see response to Frequent Comment #1.
38		G-14.2	The regulations continue to be a significant unfunded mandate.	Please see response to Frequent Comment #1.
39		G-14.3	While we agree that these regulations should contain an inspection component, the fiscal impact to our members will be substantial and cannot be ignored. NYCOM anticipates a basic inspection for a C-class dam will cost our members an estimated \$3,000 to \$15,000 depending on the size of the dam. This estimate does not take into account the expensive remediation work that will become necessary based upon the <u>inspection report finding</u>	Please see response to Frequent Comment #1.

Line #	Name/Organization	Comment Code	Comment Summary	Response
40		G-14.4	NYCOM remains concerned that even with the revisions, private dam owners may "abandon" their dams when faced with the significant costs associated with complying with the proposed regulations. As a result, local municipalities -- in order to fulfill their obligation to protect the health, safety, and welfare of their citizens -- will have to assume ownership of the abandoned dam and thus involuntarily subject themselves to <u>the regulations</u> .	Please see response to frequent Comment #1.
41	L.H. Buhrmaster, Galway Lake Camper Assoc.	G-15.1	608.1 (d) Would prefer it would stay as before without "or a duly authorized design"	Noted.
42		G-15.10	608.6 2(pg5) Where do we find a certified engineer with actual experience in this field	Please see response to Frequent Comment #4.
43		G-15.11	608.6 4(pg5) (c) Permits for docking and mooring should not be required for a lake that does not have a navigable waterway to the Mohawk River.	This comment is beyond the scope of the proposed regulations and their implementing statute.
44		G-15.12	621 (a) (2) (ii) This is in conflict with description of ordinary maintenance in 608.6.	A cross-reference to subpart 608.1(v) has been added to subpart 621.4(a)(2)(ii).
45		G-15.13	621 (a) (2) (iii) What do we do if we have to do a minor dam project before we complete an engineering assessment report?	NYSDEC has reviewed subpart 621 (a)(2)(iii) and finds it appropriate as drafted. A minor project is a project for which an engineering assessment is already on file with NYSDEC.
46		G-15.14	673.5 Where is the risk assessment that was called for by the lake owners who attended the meeting last year? NYS. Department of Transportation has a risk based assessment program that was developed to determine a replacement schedule for all bridges. Why not try this before saddling the <u>lake owner with debt they can't handle?</u>	Many dams are privately owned. The statute does not call for or authorize a risk assessment of all dams.
47		G-15.15	Concerned about the availability of engineering firms to perform the assessments, prepare safety and emergency reports and annual certification.	Please see response to Frequent Comment #4.
48		G-15.16	Concerned about financial assurance. Pg 18 (2) & (2i) "and any other cost as determined by the DEC". This still leaves us the potential liabilities that are downstream if the dam fails.	Please see response to Frequent Comment # 1.
49		G-15.2	608.1 (h) If docking facilities, rafts and platforms are prohibited, this will prohibit docks, rafts and platforms in Galway Lake that are used for sailing, swimming and fishing.	We note the original language of this subsection has been restored. It had been revised in error. "Or" has been changed back to "of".
50		G-15.3	608.1 (n) Should the definition of 'height' measure only to the height of spillway as opposed to the height of the top of the dam at its highest point?	Please see response to Frequent Comment #14.
51		G-15.4	608.1 (q) Should it be in gallons or acre feet? We prefer gallons, otherwise make it uniform throughout the proposed laws and regulations.	The language of subpart 608.1(q) reflects the statute. The language does not specify or prohibit the use of acre feet, gallons, or other volume measurement.

Line #	Name/Organization	Comment Code	Comment Summary	Response
52		G-15.5	608.1 (v) "Road maintenance, including resurfacing" should be included in "ordinary maintenance".	NYSDEC respectfully disagrees. In some cases road maintenance can change the height of the dam significantly.
53		G-15.6	608.1 (dd) If 608.1 (v) is changed to as stated in my notes for (v)	NYSDEC does not understand the comment.
54		G-15.7	608.3 Does this include, all repairs or just structural? We assume that repairs to tower gates are considered normal maintenance.	Please see response to Frequent Comment #8.
55		G-15.8	608.3 (b)(1) Height less than 40' with no limit on the gallonage, until a survey of lake is complete. One month was not enough time to calculate this accurately.	NYSDEC does not understand the comment.
56		G-15.9	608.6 (a,b,c) No sample forms were provided. Also if we have to resurface the road or replace the gaskets on the gate slides, etc. we would have to obtain a permit under the proposal. What needs to be done should be left in the hands of the Dam Safety Inspector, not cast in stone via laws or regulations.	Please see response to Frequent Comment #8.
57	Mark Wilson, Lake Placid Shore Owners' Assoc.	G-16.1	Takes issue with the narrowness of the classification system for dams. In the case of the dam on Lake Placid (listed as a "B" hazard) the threat rating as determined by the dam's measurements and the size of the lake, fails to accurately portray the true hazard. It is difficult to imagine a scenario where enough water would escape the basin sufficient to justify the current hazard classification.	This comment is specific to a particular dam. There is a mechanism to appeal a dam's hazard classification in subpart 673.5(e).
58		G-16.2	Expand the classification system to better reflect the true flooding threat posed by New York State's dams.	NYSDEC provided a response in May 2009 (see response to Frequent Comment #3 contained in the Assessment of Public Comments that accompanied the revised rulemaking).
59		G-16.3	Given the size of our association the cost and rigors of the reporting and inspection regime that the proposed regulations would impose are unnecessary in light of the negligible threat posed by our dam.	Please see response to Frequent Comment #1.

Line #	Name/Organization	Comment Code	Comment Summary	Response
60	Stephanie Lindloff, American Rivers	G-17.1	Strongly recommends DEC establish guidance on dam removal, and formally state in policy and/or guidance that dam removal, not dam breaching, is the preferred approach in at least the following situations: when an owner chooses to eliminate their regulatory responsibilities, when determining financial assurance for Class C dams, and when DEC must act in potential dam failure emergency. Currently, DEC presents both removal and breaching as an option in these situations. Furthermore, DEC must clarify the circumstances under which a breach is preferable to removal for the purpose of achieving a long-term condition that protects life, property, health, welfare and natural resources. This clarification is also in the best interest of the DEC's expenditure of resources related to ensuring safe dams statewide.	Guidance on dam breaching, removal and enforcement is planned.
61		G-17.10	673.16(i)(2) Condition Ratings – Enhanced Safety Program - Financial security: Commends DEC for this proposed rule, but concerned that it has been weakened since the previous draft. It is our understanding that this requirement will be implemented at DEC's discretion based in part upon a particular dam's Condition Rating, and will not be solely applied to Class C dams.	Noted. The commenter's understanding of the circumstances under which financial security will be required is correct.
62		G-17.11	Part 608.6 Permit application procedures: DEC must develop guidance on permit application procedures relative to dam removal and dam breach proposals. The proposed amendments do not provide sufficient clarification for such proposals. Several of the items listed in Part 608.6(a) are either not relevant to dam removal or breaching projects, or lack sufficient clarity on how they may be applicable to dam removal or breaching proposals. It is in DEC's interest to provide clear and consistent direction to dam owners seeking to remove or breach their dams. Such projects eliminate public safety hazards, reduce legal and financial liabilities to dam owners, and help restore our natural resources. DEC needs to facilitate the attainment of such benefits through clear and appropriate guidance.	Guidance on dam breaching, removal and enforcement is planned.

Line #	Name/Organization	Comment Code	Comment Summary	Response
63		G-17.2	It is in the best interest of NYS' communities and environment that DEC exercises its authority to eliminate obsolete infrastructure, such as dams, whenever possible. Otherwise, DEC is simply shifting the burden to other programs within DEC, as well as other state and federal agencies, and partners such as conservation organizations, to remedy the situation caused by insufficiently breached dams. This is a highly inefficient approach to addressing our state's aging infrastructure challenges and prolongs the detrimental public safety and environmental impacts of that infrastructure, long after it has outlived its useful purpose.	Noted.
64		G-17.3	673.2(a) Appurtenant works : Support the inclusion of fish ways in this definition, as some fishways effectively increase spillway length, and therefore contribute to a dam's spillway capacity.	Noted.
65		G-17.4	673.2(c) Breach: The proposed definition of breach continues to be problematic. FEMA's model State Dam Safety Program recommends breach to be defined as "the partial removal of a dam, creating a channel through the dam to the original stream bottom elevation" (emphasis added). Lacking sufficient guidance, we consider DEC's proposed definition to be inadequate. In addition to providing a standard for the depth of breach (i.e., to the original stream bottom elevation), dam owners should be provided with sufficient guidance to determine appropriate breach widths. These widths may vary given a particular dam's hazard class. If a dam must be breached, and not removed, it must be breached with a long-term solution in mind.	Please see response to Frequent Comment #13.
66		G-17.5	673.2(f) Dam: the proposed definition inherently includes road crossings that impound or will impound waters and therefore act as dams. The number of road crossings that behave as dams, but are not operated or maintained as dams is concerning due to potential risks to downstream life, property, infrastructure and natural resources. It is yet unclear whether the DEC intends to treat such road crossings as dams in accordance with applicable regulations.	The purpose of the impoundment of waters is not part of the definition of a dam. Road embankments may be classified as dams if they meet the definition of a dam: "any artificial barrier ... which impounds or will impound waters."

Line #	Name/Organization	Comment Code	Comment Summary	Response
67		G-17.6	673.2(w) Removal: DEC must establish a guidance document on the dam removal regulatory process. We are concerned that the phrase "eliminating" may be unnecessarily limiting in this definition. For instance, if it can be demonstrated that remaining upland structures do not cause the impoundment of water, will the department require their complete removal? Is there a design storm under which the potential for impoundment should be assessed? Does the hazard classification of the dam have any bearing on the type of information required to be submitted? Is there any discernable difference in how the department will evaluate a proposal to breach versus remove a dam? These are among the many questions that must be addressed in a dam removal guidance document.	Guidance on dam breaching, removal and enforcement is planned.
68		G-17.7	673.5 Hazard classification: DEC clearly includes natural resource damage in the determination of a dam's hazard potential classification. However, based upon conversations with DEC staff, this criterion is rarely considered in such determinations. DEC must establish guidance on the incorporation of natural resource damage in hazard classification determinations. Consulting engineers that conduct hazard classification verifications rarely consider potential for environmental damage. Therefore, it is critical that guidance is provided by DEC.	Please see response to Frequent Comment #3.
69		G-17.8	673.11 Notices of Property Transfer: Strongly supports the proposed property transfer requirement and commends DEC for incorporating our previous recommendation that dam owners shall provide information about the dam to prospective buyers prior to the closing. Given the significant financial and legal responsibilities associated with dam ownership it is critical that prospective property owners are empowered to make informed decisions.	Noted .

Line #	Name/Organization	Comment Code	Comment Summary	Response
70		G-17.9	673.12 Safety Inspections: The proposed amendments appear to contain no requirement for Class A dam owners to have an engineering assessment performed. At what point, if any, will the structural integrity of NYS' thousands of Class A dams be evaluated? The FEMA Model State Dam Safety Program recommends that low hazard class dams receive engineering assessments once every five years. DEC's proposed amendment is a striking departure from this federal guideline and from the regulations of many other states in our region. Class A dam owners should be required to conduct periodic dam safety inspections or engineering assessments of their dams. If DEC has determined this to be financially burdensome for all Class A dam owners to conduct, we encourage DEC to require this of owners of Class A dams above a certain height, and clearly state that requirement in the proposed regulations.	NYSDEC has reviewed subpart 673.12 and finds it to be appropriate as drafted. Inspection and Maintenance Plans are required to be developed and implemented for Class A dams as part of operating and maintaining them in a safe condition. A Class A dam, whatever its size, by definition is unlikely to result in damage to anything more than isolated or unoccupied building, undeveloped lands, minor roads such as town or country roads; is unlikely to result in the interruption of important utilities, including water supply, sewage treatment, fuel, power, cable, or telephone infrastructure; and/or is otherwise unlikely to pose the threat of personal injury, substantial economic loss or substantial environmental damage if it fails. The Department has the authority to investigate any dam and assign a condition rating, pursuant to subparts 673.15 and 16.
71	Gail Shaffer, Dam Concerned Citizens, Inc.	G-18.1	DEC allowed an unreasonably brief time period for public comments. More time to fully comprehend the changes would have been more reasonable (particularly for non-profit organizations such as ours with volunteer resources). It has been particularly difficult to analyze the revisions since whole sections have been reorganized and also the requirements that we submit a request to get the actual text was a burden that <u>consumed additional time</u> .	The duration of the public comment period complies with applicable law, and was necessary to prevent the expiration of the rule making. The express terms of the revised regulations were available on NYSDEC's website throughout the duration of the public comment period.
72		G-18.2	My over-all perception is that the DEC's primary concern has been to accommodate the concerns of dam owners, and to show that the state is bending over backward to minimize their burdens of cost and inconvenience. It is disheartening to find that that has been the primary thrust of the revisions. The primary concern of NYSDEC should be the protection of residents and of resources (natural, economic, etc.) downstream of these dams, with the secondary objective of reasonable sensitivity to the concerns of dam owners.	NYSDEC respectfully disagrees with the over-all perception presented in the comment. The regulations appropriately protect public safety and the environment. The revisions were made, in part, to recognize dam owners who have operated and maintained their dams in a safe manner. Dam owners who fail to operate and maintain their dams in a safe manner may be subject to an accelerated program that will bring their dams into compliance.

Line #	Name/Organization	Comment Code	Comment Summary	Response
73		G-18.3	It is imperative to eliminate the conflicts of interest inherent in the current system of self-inspection by dam owners. Inspections and engineering assessments must be conducted by an objective, independent engineer, accountable to the public through the public watchdog, NYSDEC. The current proposal provides for inspections/assessments by an engineer "on behalf of the owner". Instead, these inspections and assessments should be done on behalf of NYSDEC, either by DEC staff engineers or by consulting engineers contracted by DEC and accountable only to DEC, to eliminate any bias inherent in the current relationship of an engineer paid by the owner, who is acting in the owner's interest and can be influenced by the owner. This is the most glaring problem that the regulations, as proposed, fail to address. The lack of independence of the engineers compromises their credibility, in perception and in fact.	The requirement that owners operate and maintain their dams in a safe condition is longstanding and statutory. These regulations require owners to retain a professional engineer to undertake certain work on a dam. The New York State Educational Law imposes both ethical and technical standards on professional engineers in carrying out their work. See also response to Frequent Comment #1.
74		G-18.4	Regardless of the primary purpose of a dam is water supply, it must be acknowledged in law that the public interest in flood mitigation must also be part of their mission, since they have been granted licenses to use the public water resources for their main purpose. The lack of such explicit requirement in current law is a serious lacuna that has proven to be an obstacle to swift, common sense cooperation in severe weather episodes that have caused loss of property and human life. This cooperation to save lives and property should not be left to the whim of particular individuals or the good graces of a particular political administration of city or state government. It needs to be given solid foundation in law.	This comment is beyond the scope of the proposed regulations and their implementing statute. NYSDEC's dam safety program addresses the risk of floods that may be attributable to deficient or failed dams, regardless of the purpose for which the waters were impounded by the dam.
75		G-18.5	Given the significant potential impact on life and property of dam deficiencies, particularly of Class C / High Hazard dams, it is imperative that throughout the text, the dam safety regulations strengthen requirements for public disclosure: of inspection reports, of engineering assessments, of any proposed revisions to either design or operating procedures, of reported anomalies that could affect emergency response plans, etc.	Please see response to Frequent Comment #7.
76	Susan McDonnell, Westchester Lake Property Owners Association	G-2.1	The proposed regulations shift the financial responsibility of dam inspections and repair onto the homeowner associations / dam owners. However, homeowner associations / dam owners do not have the resources to handle this burden for the following reasons:	Please see response to Frequent Comment #1.

Line #	Name/Organization	Comment Code	Comment Summary	Response
77		G-2.2	1) Homeowner Association Dues: Payment of homeowner association dues is voluntary and are paid in good faith by those members/owners who wish to. There is no longer a legal recourse available to Homeowner Associations to require those <u>who do not pay dues, to pay up.</u>	Please see response to Frequent Comment #1.
78		G-2.3	2) Taxing Authority: Homeowner associations have no taxing authority through tax levies. The proposed regulations do not set forth a funding mechanism to assist homeowner associations in rehabilitating their dams, public or private. Owners are left to apply for funding through legislative processes and under budgetary constraints. At this point in time, there are no budget dollars allocated to dam rehabilitation <u>in our region of NYS.</u>	Please Frequent Comment #1.
79		G-2.4	3) The shift of the responsibility for inspections of dams to the owner only increases the burden described above.	Please see response to Frequent Comment #1.
80		G-2.5	4) Emergency plans: While it is appropriate to have emergency plans, there are no practical guidelines in the regulations for them. They may range from several phone calls to use of high level monitoring equipment at a high level cost.	Please see Frequent Comment #2.
81		G-2.6	These shifts in responsibility and unfunded mandates will ultimately result in dams not being inspected (and dam owners being fined, another financial burden) and rehabilitated due to limited financial resources of homeowner associations.	Please see response to Frequent Comment #1.
82	Roy Keats, Member, Garnet Lake Civic Association	G-3.1	Concerned about the impact on small lake associations of the added costs of Safety Inspections, Engineering Assessments, Emergency Action Plans and Financial Assurance. These associations only get voluntary contributions from their membership. They have no taxing authority. At this point there is no funding available for private dam owners.	Please see response to Frequent Comment #1
83		G-3.2	Publicly accessible lakes impounded by dams, such as Garnet Lake provide a public good through the state access and shoreline. In fact, Garnet Lake has an extremely high usage by the public. Garnet Lake has approximately 70% state shoreline with public campsites and a heavily used boat launch.	Please see response to Frequent Comment #5.
84		G-3.3	The DEC's definition of owner includes someone who "uses" the dam. Thus, by definition, the state is basically a co-owner of every dam in the state, and is therefore also financially <u>responsible for these dams.</u>	Please see response to Frequent Comment #5.

Line #	Name/Organization	Comment Code	Comment Summary	Response
85		G-3.4	As part of DEC's responsibility to protect the environment: 1. The DEC needs to ensure that adequate funding exists to assure the continued viability of the state's dams and existing flood control system.	Please see response to Frequent Comment #1.
86		G-3.5	2. The DEC should be proposing to the legislature an adequate funding mechanism to take care of this. Many other states have established funds to maintain their dams.	Please see response to Frequent Comment #1.
87		G-3.6	3. To facilitate items 1 and 2, the Dam Safety Group should investigate the potential cost of the required inspections, reports, financial assurance, and potential dam modifications needed for updated worst case floods. This is also needed to satisfy Executive Order 17 about non-funded mandates issued by the governors office.	Please see response to Frequent Comment #12.
88		G-3.7	4. Because of the voluntary nature of small lake associations, it is questionable that they can be relied upon to maintain record keeping and other functions on a permanent basis. The Dam Safety Group should recommend that dams owned by small associations or individuals be taken over by either the Town or County involved. This would facilitate emergency monitoring by ensuring full time staffing of emergency response positions, ensure adequate record keeping, and facilitate the use of publicly available grant money for the upkeep of dams. If this is not feasible, then the Town or County should be designated the official responsible party for record keeping, response to requests for records, EAP updates, and Inspection and Maintenance Plan updates.	This comment is beyond the scope of the proposed regulations and their implementing statute. The owners of dams, as defined in statute and reflected in these revised regulations, have been and remain responsible for the operation and maintenance of their dams in a safe condition. This is so independent of an owners membership in a voluntary association.
89		G-3.8	5. In addition, dams which form lakes with in excess of 50% state shoreline and public boating access should be considered Public Dams, and have the state perform all of the items required of owners.	Please see response to Frequent Comment #5.
90	Robert E. Manning, Garnet Lake Dam Committee	G-4.1	In section 673.8 (d) Annual Certification directions for signing are given for corporations, partnerships, and municipalities. Who should sign when the dam is "owned" by a combination of entities? In a case like this the municipality involved should have primary responsibility for the dam. The regulation would state: "In cases of multiple ownership involving a municipality, the municipality shall be responsible for preparing and signing the Annual Certification."	Please see response to Frequent Comment #5. No substantiation or rationale is provided for making a municipality a divisible and primary responsible party among several owners, nor for the implication in the comment that municipalities can in all cases better afford the costs of compliance than private owners.
91		G-4.2	The Town should also have overall responsibility for 673.10 Recordkeeping and Response to Request for Records. Other responsibilities which would logically fall to the Town are the annual EAP update and the Inspection and Maintenance Plan update.	This comment is beyond the scope of the proposed regulations and their implementing statute. Please see Comment/Response G-4.1, above.

Line #	Name/Organization	Comment Code	Comment Summary	Response
92		G-4.3	On another question of responsibility, more than half of the shoreline of Garnet Lake is owned by the State. As the State has the majority usage of the lake, the State should assume the responsibility for the dam inspections. The regulation would state - "In cases where the state owns more than half of the shoreline of a lake and encourages public use, DEC engineers will make the required Safety Inspections and Engineering Assessments."	Please see response to Frequent Comment #5.
93	Rena M. Doing and James Hogan, PRLOA and NYSFOLA Board of Directors	G-5.1	Concerned about the impact on small lake associations of the added costs of Safety Inspections, Engineering Assessments, Emergency Action Plans and Financial Assurance. These associations only get voluntary contributions from their membership. They have no taxing authority. At this point there is no funding available for private dam owners.	Please see response to Frequent Comment #1.
94		G-5.2	The definition of owner includes someone who "uses" the dam. Thus, by definition, the state is basically a co-owner of every dam in the state, and is therefore also financially responsible for these dams.	Please see response to Frequent Comment #5.
95		G-5.3	As part of DEC's responsibility to protect the environment DEC needs to ensure that adequate funding exists to assure the continued viability of the state's dams and existing flood control systems.	Please see response to Frequent Comment #1.
96		G-5.4	2. DEC should be proposing to the legislature an adequate funding mechanism to take care of this. Many other states have established funds to maintain their dams.	Please see response to Frequent Comment #1.
97		G-5.5	5. To facilitate items 1 and 2, the Dam Safety Group should investigate the potential cost of the required inspections, reports, financial assurance, "and potential dam modifications needed for updated worst case floods." This is also needed to satisfy Executive Order 17 about non-funded mandates issued by the governor's office.	Please see response to Frequent Comment #12.
98		G-5.6	6. County Emergency Management, County Soil & Water or USDA NRCS agencies could be designated to work with lake associations to coordinate record keeping, response to requests for records, EAP updates, and Inspection and Maintenance Plan updates.	The comment is noted. The scope of the current rule making is to implement the statutory amendments of 1999 and 2006.
99		G-5.7	The costs of compliance could ultimately result in less dam safety instead of more safety. In addition, there could be a loss of vital local and state tax resources, due to decreased property values, loss of recreation/tourism and general sales tax.	Please see response to Frequent Comment #1.

Line #	Name/Organization	Comment Code	Comment Summary	Response
100	Bob Rivers, Warners Lake, East Berne	G-6.1	These revised proposed regulations appear appropriate except for the costs associated to comply. Our Association membership is voluntary and consists of many "off lake" non residents. As proposed these regulations could either bankrupt our association or destroy it completely by depleting our membership to zero. Without our Association there would be no "owner" of the dam to comply with these regulations. NYSDEC must provide a fund source to assist volunteer associations with the required financial and engineering requirements of these regulations.	Please see response to Frequent Comment #1
101	John P. Opp, Melody Lake Assoc. of Cortland County, Inc.	G-7.1	The changes proposed to these regulations will impose a significant and probably unbearable financial burden on the property owners at Melody Lake. It is our hope that funding assistance from all available or potential sources will be explored by the DEC and made available to implement these revised regulations.	Please see response to Frequent Comment #1
102		G-7.2	The proposed revisions to the regulations impose requirements for safety inspections, engineering assessments, emergency action plans and financial assurance portions of which, depending on the level of specificity that will be required, could cost several thousands of dollars a year to comply. We simply do not have the resources or access to resources for those amounts of money.	Please see response to Frequent Comment #1.
103		G-7.3	We have heard comments in response to those organizations that have indicated a financial hardship along the lines of ..."well, then just drain the lake." While that may be an easy initial solution to take pressure off the dam, it certainly will increase the pressure on the State of New York, Cortland County, and the Town of Willet in our situation. The amount of property and school taxes paid on an annual basis by property owners at Melody Lake accounts for approximately 15 percent of all taxes collected in the township. A significant reduction in property value caused by draining the lake will be followed by a significant reduction in the taxes collected.	NYSDEC denies the response as described in this comment. The breach of a dam requires careful planning, and it most often requires a permit and the input of a professional engineer. Please see response to Frequent Comment #1.

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104		G-7.4	The expense of addressing those concerns needs to be kept within reason, or funds need to be made available for private property owners. We feel we have members with the knowledge and experience to develop a suitable emergency action plan, to prepare a procedure for routine safety inspections and maintenance activities needed on the dam with guidance from DEC, as well as carry out those inspections and prepare and submit competent reports. We question the need for in depth engineering assessments and financial assurances that are perhaps the most expensive requirements on a repetitive basis, again a financial burden we cannot meet without assistance from the State or Federal level.	Please see response to Frequent Comments #1 and #6.
105	Robert Rosati, NYSFOLA	G-8.1	The definition of dam owner remains to be a concern. Many dams are owned by lake associations. These associations rely on the dues paid by association members. Since the initial regulations were proposed, many associations have experienced a decrease in membership to attempt to avoid the expense and responsibility. While we do feel it is the responsibility and obligation of all property owners to pay membership, the current laws make it difficult to enforce. While there is the option of forming a tax district, it must be done with the approval of the municipality which is, many times, not an option.	Please see response to Frequent Comment #5.
106		G-8.2	Our Class A members are concerned with the cost of proving that they are, in fact the owner of a Class A dam. Even though it may be obvious, the department's own estimate is \$1,300-\$8,000 for a Hazard Class Verification of a Class A Dam.	Class A dams now need only verify their Hazard Classification at the Department's request.
107		G-8.3	There are also some concerns from our Class B and Class C Dam owners. Part 673.12 require a safety inspection to be performed by an engineer. Since this requirement includes only a "visual inspection", the cost of an engineer seems unnecessary. If the visual inspection identifies a problem, then and only then, should an engineer be necessary to develop corrective action. Part 673.3(i) does allow the DEC to waive certain requirements in lieu of reports or inspections for, or by, other government agencies; however our contact with SWCD and NRCS find them hesitant to accept the responsibility and liability to their agency.	The comment is factually incorrect. As specified in subpart 673.12(d), the Safety Inspection is more detailed than a visual inspection. In addition to a visual inspection, it includes a review of all relevant documents, an evaluation of all data generated by instrumentation, the development of recommendations to address data gaps or deficiencies in monitoring, the identification of deficiencies in the dam, and the development of recommendations to fully address deficiencies in full accordance with ECL Article 15 and the revised regulations. In addition, owners are expected to conduct 'visual inspections' more frequently, as is set forth in NYSDEC's guidance, which is available on NYSDEC's website.

Line #	Name/Organization	Comment Code	Comment Summary	Response
108		G-8.4	<p>An additional concern is the cost of the requirement for an engineering assessment. While we do realize the importance of this requirement, the cost makes compliance prohibitive. We have recently heard of possible federal funding available to public dams that have been neglected over the years. Some feel that this is a "slap in the face" to the private dam owners while actually rewarding the owners that have been neglecting their responsibility. Records show that, for the most part, private dam owners have been better at maintaining their dam than those owned by government agencies. In many cases, these property owners are seasonal, and provide a substantial economic contribution to the community, in the form of taxes and support of local businesses, with very little say in the municipalities operations. We encourage the department to continue to attempt to pursue funding sources to allow dam owners to comply with these regulations.</p>	<p>Please see response to Frequent Comment #1.</p>
109		G-8.5	<p>One additional small concern is for the dam owners to provide Annual Certification to DEC by January 31st of each year. Since many of our members are seasonal, a more practical and realistic date would be sometime during the late spring to early fall.</p>	<p>Subpart 673.8(a) requires an annual submission "by" -- or no later than -- January 31. The submission of an annual certification at another time (e.g., in the late fall of the prior year), is not prohibited so long as no more than one year elapses between submissions. In order to adopt such an alternate schedule, and by way of illustration only, a dam owner would likely need to submit two annual certifications in the first year of the alternate schedule - one on or by January 31, and a second one in the late fall, for example. Thereafter regular submission by a date certain in the late fall may be acceptable under normal circumstances. No change in the revised regulation is necessary. A dam owner interested in filing according to an alternate schedule should coordinate with NYSDEC's Dam Safety Section before implementing an alternate schedule.</p>

Line #	Name/Organization	Comment Code	Comment Summary	Response
110	Art Collings, Vice President, Dutchess Land Conservancy	G-9.1	Concerned with impact of the proposed new regulations on private landowners. If the burdens placed on private landowners are too great, over time the result will be a significant loss of ponds, especially larger ones, throughout the county. The regulations should be simple, stream-lined, and incentive-based, and the cost burdens for landowners minimized through the development of a strong cost-share program. In order to create a strong program that ensures the soundness and safety of Dutchess County's dams, it will also certainly be necessary to ensure that the needs and circumstances of private landowners are respected.	Please see response to Frequent Comment #1
111	D. W. Lake, P.E., CPESC, CPSWQ	I-1.1	Recommends, perhaps in Part 608, a statement to the effect that a dam is considered an engineering practice in accordance with the NYS Higher Education Law and as such requires the appropriate expertise in design.	Please see Frequent Comment #4. In addition, the language of subpart 608.1(j) cites the Department's full definition of "engineer", which, in turn, cites language in the Education Law.
112		I-1.10	Part 673.6(a) The language in this item requiring an Inspection and Maintenance Plan is lengthy and confusing. It should be compressed to get to the point that B&C hazard dams requiring a DEC permit will have I&M plans developed for them within 12 months.	Please see Frequent Comment #10.
113		I-1.11	Part 673.15 - Streamline language already contained in 673.14 and build on it.	Subparts 673.14 and 673.15 address two different matters. Subpart 673.14 discusses NYSDEC's right to conduct a Field Inspection, develop a Field Inspection Report, and distribute the Field Inspection Report for "B" and "C" hazard class dams to specific parties. Part 673.15, while discussing the right of NYSDEC to enter upon land and waters, the purpose is to conduct a more thorough "investigation" of a dam.
114		I-1.12	Part 673.16(i)(2), insert "unsafe" between "...the dam..."	The term "unsafe" is already included. The existing language in subpart 673.16(i)(2) is appropriate in that it implements subpart 673.16(d), which applies to dams that have a Condition Rating of "unsafe", "unsound" or "deficiently maintained".
115		I-1.2	Section 608.6(3)(b)(3) states the department can accept a certification from an engineer for Class "A" dam in lieu of a detailed design report, construction plans and specifications. The hazard classification can change and DEC should delete this short cut, and continue to maintain the appropriate technical files for future reference as needed.	Department will closely examine requests to submit a certification. Because of the wide variety of Class "A" dams and the low risk they pose, the flexibility is warranted, as appropriate.

Line #	Name/Organization	Comment Code	Comment Summary	Response
116		I-1.3	Part 608.3(c) states that permit requirements for dams, in part, are dependant upon the dam's Hazard Classification. I don't believe the hazard classification has been used as such. Under the proposed rules a 25 foot high dam with 3 acre feet of water behind even if a class "c" hazard, would not require a permit. The reference to hazard classification should be stricken.	Subpart 608.3(c) uses the hazard classification to determine the requirements in a permit, not whether a permit is required or not. Subparts 608.3(a) and 608.3(b) identify when a permit is required. The size thresholds for permit applicability (subpart 608.3(b)) are statutory.
117		I-1.4	Part 673.5(d) When changing the hazard classification of a dam, DEC should provide the basis and also an analysis to eliminate potential arbitrary assignations.	Please see Frequent Comment #3.
118		I-1.5	Part 673.7(e) states an owner of a Class B, shall have the EAP prepared by an engineer only upon the request of the DEC. The methods and procedures used to determine the hazard classification are done by the engineer and an engineer is required to certify the hazard class. Therefore, how will DEC determine in advance what can be done by others based on "discretionary" consideration? If there are specific general components of all EAP's that can be provided by other than engineering technical experts evaluating the breach performance of the structure, that should be stated in this section	Please see Frequent Comment #2.
119		I-1.6	Part 673.14(a), states that "...the department or its duly appointed agent(s) may, at its discretion and without prior notice, enter upon lands and waters in order to perform a field inspection of a dam." This language should be changed to reflect a notification prior to the inspection to avoid potential conflicts in the field. Notification can be in the form of a formal written notice or telephone contact within 24 hours or something similar. This would help avoid an argument of trespass.	The language of subpart 673.14(a) is statutory (see ECL §§15-0305, 15-0507(2), and 15-0511(1)). NYSDEC's general practice is to make reasonable efforts to contact land owners before going onto private lands.
120		I-1.7	The term "illegal dam" is used but is not specifically defined. This definition should be added.	The term "illegal dam" is statutory (see, ECL §15-0511).
121		I-1.8	Reference is made to "on a form prescribed by the department" but no reference is stated where these can or will be found.	Because electronic communications technology changes over time, the electronic "location" of forms was not provided. However, all dam safety forms prescribed by the department will be available on the department's website (www.dec.ny.gov) for the foreseeable future, and at anytime in hard copy upon request. This includes the forms "prescribed by the Department", as referenced in subparts 608.6 (permit applications procedures) and 673.8(a) (annual certification).
122		I-1.9	Part 673.2 (n) add "at its highest point" to the definition of the "Height" of a dam to agree with Part 608.	Please see Frequent Comment #14.

Line #	Name/Organization	Comment Code	Comment Summary	Response
123	John M.Kunzman, Endicott, NY	I-2.1	Under 673.2 Definitions: (r) `Maximum impoundment capacity' means the measurement of volume of waters that are impounded when the water level of the impoundment is at the top of a dam. This doesn't make sense considering that properly designed dams which have spillways, including auxiliary spillways, should never be able to impound water that would reach the top of their dam. Revise to state: `Maximum impoundment capacity' means the measurement of volume of waters that are impounded when the water level of the impoundment is at the maximum height before discharge by means of a spillway around the dam	Please see response to Frequent Comment #15.
124		I-2.2	Under 673.2 Definitions: (t) `Owner of a dam means any person or local public corporation who owns, erects, constructs, reconstructs, repairs, breaches, removes, maintains, operates, or uses a dam." This is a broad definition, and includes people who are not truly 'owners'. The definition should state: 'Owner' of a dam means any person, governmental agency, or corporation that owns the property or controls the property where the dam is situated	Please see response to Frequent Comment #5.
125		I-2.3	Under 673.6 Inspection, Operation and Maintenance: Considering that a Class "A" hazard classification is defined as a "Low Hazard", an Inspection and Maintenance Plan should pertain only to dams that have a "B" or "C" hazard classifications. The paragraph should be re-written to state: a) Inspection and Maintenance Plan. The owner of a dam that is equal to or greater than 15 feet in height or has a maximum impoundment capacity equal to or greater than three million gallons, unless the dam has a height equal to or less than six feet, regardless of impoundment capacity, or an impoundment capacity less than or equal to one million gallons, regardless of height, and has been assigned a Hazard Classification of Class "B" or "C" pursuant to section 673.5 of this Part, or (2). . .	Please see response to Frequent Comment #10.
126		I-2.4	Under 673.11 Notices of Property Transfer: (a)(l) Notice by Seller or Transferor. Is it really necessary for the DEC to dictate that this information be given to a prospective buyer before the signing of a contract? It would seem that the prospective buyer should be advised of the need to disclose this information, but not be given the particulars until after signing such an agreement.	Subpart 673.11(a) is appropriate. To provide an example, a prospective buyer is to receive a description of the dam and its location before signing a contract of sale in which he commits to purchase the dam. However, the full documentation concerning the dam is to be shared with the buyer no later than the actual transfer of property rights, which typically occurs at the closing - which is often well after the signing of the contract

Line #	Name/Organization	Comment Code	Comment Summary	Response
127		I-2.5	Under 673.16 (i) Enhanced Safety Program, (2) "Financial Assurance" means a dam owner establishes and maintains financial security that is payable to the department in an amount sufficient to pay for the breach or removal of the dam by the department, should such breach or removal be deemed necessary. ** I have a real problem having the DEC (or any governmental agency for that matter) have any control over a private individual's, municipality's, or corporation's money for whatever purpose. It always seems that government pays much more than the private sector to complete any project.	Please see response to Frequent Comment #6.
128		I-2.6	(i) The amount of the financial security is sufficient if it is adequate to fully cover the costs associated with a breach or removal of the dam, including the costs of: labor and materials for design and construction; investigations and surveys; construction plans; environmental mitigation associated with any of the actions taken; and any other appropriate cost as determined by the department. **This statement should only state: (i) The amount of the financial security is sufficient if it is adequate to fully cover the costs associated with a breach or removal of the dam. What is the intention regarding the inclusion of "materials for design and construction; investigations and surveys; construction plans; environmental mitigation; and the greatest catch-all of all - and any other appropriate cost as determined by the department? I thought breach or removal didn't involve design or construction.	The Department has determined that subpart 673.16(i) is appropriate. Experience in the State and in other states has shown that the breach or removal of a dam generally requires investigation, design, and construction in a controlled manner that avoids harm to people, property and the environment. Similarly, no dam owner may breach or remove a dam (that exceeds the size thresholds) without a dam construction permit (ECL Article 15).
129		I-2.7	(ii) The form of the financial security shall be one or more of the following: a surety bond guaranteeing performance; one or more irrevocable letters of credit, payable to or at the direction of the department; a trust fund established for the benefit of the department; a policy of insurance that provides the department with acceptable rights as a beneficiary thereof and that is issued by an insurance carrier whose operations are subject to regulation and examination by a state agency; one or more annuities; or one or more certificates of deposit; any other form which the department determines to be acceptable. ** Again, I have a real problem giving anyone control over my money. How do you propose to get money from individuals that do not have the financial where-with-all to establish these financial securities?	Please see response to Frequent Comment #6.

Line #	Name/Organization	Comment Code	Comment Summary	Response
130		I-2.8	Under 673.17 Orders of the Department, (e) The department shall certify the amount of the costs and expenses incurred by the department or any state department or agency during the course of any work undertaken pursuant to this section for the removal, repair, or reconstruction aforesaid in any way connected therewith to the county legislative body of the county or counties in which the said lands and waters are located. ** This creates a hardship upon the owner of the property, most likely causing the owner to loose the property to the county through a tax sale. I think you need to re-visit this entire "Financial Assurance" issue.	The referenced language in the revised regulations comes from the dam safety statute (see ECL §15-0507) and represents but one method of cost recovery among "other rights of recovery as may exist by law" (ECL §15-0507(6)).
131	Geraldine Hallock	I-3.1	In 2006 I was evacuated from my home because of potential dam failure of the Jeffersonville Hydroelectric Co. (Dam at Lake Jefferson) in Jeffersonville, New York. In the aftermath of that event I was surprised to find how difficult it was to obtain information on the specifics of the failure. At a minimum all homeowner's at risk should this dam fail should be kept advised of it's current status regularly. We should not (as taxpayers) have to investigate how to be kept informed.	Please see response to Frequent Comment #7.
132		I-3.2	The proposed changes are now giving dam owners more time and giving unsuspecting and for the most part uninformed property/homeowners (in the path should these dams fail) more time, at risk. The welfare of many is being sacrificed for the financial convenience of the few (dam owners). . .Are all public at risk aware they are at risk? Is it their comments that initiated these changes? Or, is it the comments of the more informed dam owners that are behind the time extensions and less explicit schedule for safety inspections?	The revised regulations reflect the Department's authority to impose a shorter time frame in the interest of public safety based on a condition rating of "unsafe" or "unsound" .
133	John Guercio, Hyde Park, NY	I-4.1	Concerned about the financial burden of the added costs of assessments and inspections that will need to be performed.	Please see response to Frequent Comment #1.
134	Heidi Mouillesseaux-Kunzman	I-5.1	Under section 608.6 Permit application procedures: (a) (3) If "other information that the department deems necessary to properly review and assess the effects of a proposed project" may be required in a permitting process, it will be important for the DEC to outline the process by which the applicant engages the DEC to ascertain the information that the DEC requires. It will also be important for the DEC to make sure this "other information" is made clear early on so that the applicant is aware of all requirements from the beginning.	The NYSDEC Division of Permits helps with permit scoping for proposed projects. NYSDEC strongly encourages project sponsors to have a pre-application meeting with NYSDEC staff to identify any special concerns.

Line #	Name/Organization	Comment Code	Comment Summary	Response
135		I-5.10	673.5 Hazard Classifications (b) (4) The meaning of "the department may retain pertinent records regarding such dams" in reference to Class D dams should be clarified. For example, does this mean the Department can inspect the site of a former dam, require records from the property owner, or simply (and literally) keep records on file? This relates to section 673.14 (a) as well, which says "the department or its duly appointed agent(s) may, at its discretion and without prior notice, enter upon lands and waters in order to perform a field inspection of a dam." Again, does this include Class D dams?	The Dam Safety Section retains records in its possession on a dam after the dam's hazard classification is changed to a "D". NYSDEC retains the statutory authority (see ECL §§15-0305 and 15-0507(2)), to perform a field inspection if deemed necessary to confirm, by way of illustration only, that a Class D dam was properly classified and/ or has not been rebuilt.
136		I-5.11	673.7 Emergency Action; Emergency Action Plan: (a) Are annual updates of an entire EAP necessary? If so, but nothing has changed, or only a single page has changed, is a statement identifying the changes or absence of changes sufficient as an update? Perhaps this was intended to be clarified in (j) of this section, which seems to be an incomplete sentence where it says "any pages of the EAP annually." Shouldn't it say "all pages" if the intent of "any" is not only certain, presumably, updated pages?	The owner of a dam must undertake an annual review of the Emergency Action Plan (EAP) in order to ensure the information within the EAP is current. After an EAP is on file with NYSDEC, the owner of a dam must then submit to NYSDEC, at least on an annual basis, only those pages of the EAP which have been changed in order for the EAP to remain accurate. This is the intent of 673.7(j). Please see response to Frequent Comment #2.
137		I-5.12	673.7 Emergency Action; Emergency Action Plan: (b) Clarify whether or not the required EAP copies may be forwarded in hard copy or electronically. Given the potentially significant costs to be born by a dam owner in the development of such a plan (e.g.. costs of an inundation study), and the regular use of electronic communication and storage, it seems like an <u>electronic copy should be permissible</u> .	Please see response to Frequent Comment #2.
138		I-5.13	673.7 Emergency Action; Emergency Action Plan:(e) & (f) At the same time I appreciate that Department's willingness to permit "acceptable description[s] of [a] potential inundation area" other than an inundation map, it seems naïve or misleading to suggest that a Class B dam owner will not need to have an engineer involved in the development of an EAP, given that inundation maps, possibly necessitating dam break analyses are required. At the NYSFOLA meeting presentation on EAPs, it was implied that developing an EAP for Class B and Class C dams will inevitably entail the work of an engineer.	Please see response to Frequent Comment #2.

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139		I-5.14	673.7 Emergency Action; Emergency Action Plan:(e) & (f) These two subsections leave a lot of room for discretion and confusion on what is expected. It will be important for the DEC to inform a dam owner of what it will or will not accept in terms of an EAP before the dam owner goes through the trouble of drafting it. Furthermore, the DEC should be prepared for multiple inquiries regarding the development of these plans as <del>the deadline for development approaches</del>	Please see response to Frequent Comment #2.
140		I-5.15	673.7 Emergency Action; Emergency Action Plan:(g) and (h) require the dam owner to fully implement all provisions of the EAP and to submit a written Incident Report activating the EAP, respectively. However by the nature of what an EAP process entails, the dam owner will not (and should not) fully implement an EAP, but rather start the process and let the proper emergency management authorities act accordingly. Thus, the responsibilities for these two items should be given to the emergency management entities responsible for responding to <del>emergency situations</del>	Please see response to Frequent Comment #2.
141		I-5.16	673.7 Emergency Action; Emergency Action Plan: (j) The section also indicates that the dam owner shall update the EAP annually and "more frequently, as necessary to promptly reflect changes in current conditions." In many cases the EAP must be done by an engineer and yet most updates (e.g. phone number changes) will not require the work of an engineer. There should be some clarification as to when an "update" to an EAP requires an engineer's involvement. Time and money would be wasted if dam owners are required to hire an engineer for activities that do not require their services.	Please see response to Frequent Comment #2.
142		I-5.17	673.17: (b) Where is 673.18 as referred to in this section?	The misprint has been corrected to read 673.17(a).
143		I-5.18	The overall tone of the revised regulations continues to place the responsibility of dam management solely on dam owners, despite the fact that they cannot control up or down stream influences. The DEC should be working with partners in other parts of our government to ensure that communities are thinking more holistically about watershed management. Given the public good served by many privately owned dams, it is unfair that the owners of these dams are required to accept sole <del>responsibility for the costs of the dam</del>	This comment does not address NYSDEC's May 2009 revisions to the 2008 proposed regulations and is therefore beyond the scope of this Assessment. However, NYSDEC notes it is a longstanding statutory and regulatory requirement that dam owners operate and maintain their dams in a safe condition. Please see response to Frequent Comment #1.

Line #	Name/Organization	Comment Code	Comment Summary	Response
144		I-5.19	DEC should develop clear and simple guidelines to help dam owners navigate the many inspections, assessments, management activities, and reports required of them. The guidelines should articulate all of these responsibilities, and include the frequency with which they are required. It would also be helpful if examples of the required reports were provided so that dam owners will have a clearer understanding of the <u>expectations</u>	The revised regulations specify the work plans and reports to be produced as well as deadlines for submission, where applicable. Existing guidance is and has long been available on NYSDEC's website, and updated guidance is being prepared.
145		I-5.2	Under section 608.6 Permit application procedures: (e) The requirement that "structural and hydraulic design studies, calculations and procedures...shall, at a minimum, be consistent with generally accepted sound engineering practice in the field of dam design and safety" suggests the DEC will respect and, at the least, be willing to accept recommendations of engineers that follow these guidelines. If the DEC is unwilling to accept recommendations based on this criteria, then there should be a process through which dam owners can appeal the DEC's judgments that are at odds with their own engineers, particularly given that engineer certifications are required by the DEC	The regulations include an appeal process.
146		I-5.20	I understand the Department has been working to address the need for funding to support dam safety. I applaud these activities and encourage the Department to continue doing so. It is clear that implementation of these regulations will impose economic requirements that many, particularly private, dam <u>owners will not be able to afford</u>	Please see response to Frequent Comment #1.
147		I-5.21	Given the substantial burdens (fiscal, reporting, liability) that the new regulations will impose on dam owners (and particularly those who may not have ever considered themselves to be dam owners in the past - e.g. "users"), it seems likely that many dam owners may opt to remove their dams. Given that the Department's focus on dam safety has primarily been in relation to the construction and maintenance of dams, it will be important for it to get up to speed on supporting dam owners seeking to remove their dams.	Please see responses to Frequent Comments #1 and #5.

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148		I-5.22	Strongly encourages DEC to engage dam owners in an advisory capacity. With some exceptions, safety is foremost in the minds of dam owners, who want to be good stewards of our lakes and dams, as well as good neighbors. Engaging us (along with engineers, residents downstream of dams, Soil and Water Conservation District professionals, and others) as partners in the development, implementation, and periodic review of these regulations and any related guidelines and procedures will ultimately be to the benefit of the DEC, dam owners, and New York communities.	Noted.
149		I-5.3	Under section 673.2 Definitions: (a) The relationship between "appurtenant works/structures" and "dams" needs to be clarified. 'Appurtenant works' and 'appurtenant structures' are defined as "structures built or materials placed and/or maintained in connection with a dam....[and] "may include...such structures as spillways." At the same time, "dam" is defined as "any earthen barrier or other structure, together with its appurtenant works." These two definitions seem to contradict each other. Are 'appurtenant works' part of a dam or are they something separate as "in connection with a dam." Section 673.3 (a) "dams and all appurtenant works" also implies they are separate things.	The cited language has been reviewed and determined appropriate as drafted.
150		I-5.4	Under section 673.2 Definitions: (c) "Breach" of a dam is defined as lowering of a dam's normal impoundment level. However, there are times (such as prior to very high water events) when proper dam management may require the lowering of a dam's "normal impoundment level." 608.3 (a) requires a permit for a number of changes to a dam, including a "breach." Will a permit be required in every one of these events or are there exceptions? If the latter, the exceptions, or at least an acknowledgment that there are exceptions, should be articulated in the regulations.	Please see response to Frequent Comment #13.

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151		I-5.5	Under section 673.2 Definitions:(k)(ii) The definition of "Engineer" leaves room for subjective interpretation and therefore paves the way for disagreement. In the implementation of these regulations, the DEC should consider providing dam owners with a set of criteria to help determine whether or not an engineer possesses "sufficient specific education, training, and experience" and is "competent". Or the DEC should assess the competencies of engineers who want to work on NYS dam projects and give or deny them the opportunity to do so, providing dam owners with a list of the engineers who are deemed competent by the DEC. A dam owner should be able to presume that if the DEC has deemed an engineer to be competent, that the methods and models employed by the engineer are acceptable to the DEC. Dam owners need assurances that they won't spend money on the services of an engineer they believe meet the criteria set forth in these regulations only to have the DEC reject the outcomes of those services.	Please see response to Frequent Comment #4.
152		I-5.6	Why is "financial assurances" left out of the definitions and only defined later where it is used in subsection (673.16) (i) (1) (iv)?	The term "financial assurance" appears only in one subpart of the revised regulations. For the convenience of the reader, the definition therefore immediately follows its first use within that subpart.
153		I-5.7	673.3 General Provisions (a) "Condition Rating" like "Hazard Classification" should be defined in the definitions.	NYSDEC respectfully disagrees. These regulatory terms are set forth in their respective subparts, as each is detailed and relatively lengthy. The detailed list of section headings at the beginning of Part 673 may provide some general assistance to the reader in identifying relevant content.
154		I-5.8	673.3 General Provisions (c) "Upon reasonable notice," should be defined more clearly as dam owners and the Department may define "reasonable" differently. Moreover, without a specified time period, the Department may define "reasonable" differently in different cases, potentially acting arbitrarily and unfairly in the eyes of dam owners.	NYSDEC reviewed subpart 673.3(c) and has determined the draft language is appropriate. Dam owners are required to keep records concerning the dam "available and in good order". Therefore, should NYSDEC request records, it should not be unreasonably burdensome to furnish them. Having said that, each dam and dam owner is unique, and NYSDEC has not set forth a stated number of days in order to allow for some level of flexibility - for the benefit of dam owners as well as NYSDEC. Should an owner disagree with NYSDEC's process, the owner may pursue any legal rights for relief.

Line #	Name/Organization	Comment Code	Comment Summary	Response
155		I-5.9	673.3 General Provisions(i) (j) The opportunity for discretion to be used in accepting diverse types of "reports" and in extending "timeframes and schedules" in consideration of "extraordinary economic hardship," should not be used in an arbitrary manner.	Subpart 673.3(i) has only to do with the possibility of accepting reports prepared by or for other government agencies, such as FERC. Subpart 673.3(j) provides a very narrow set of circumstances that would allow an extension of time - it is unlikely that compliance, alone, will result in "extraordinary financial hardship", and if it is demonstrated that extraordinary financial hardship will be posed solely by compliance, and does not already exist, it is even more unlikely that an extension of time, which is all that is offered in this subpart, will alleviate the hardship. Alleviation of the financial hardship is not promised by this subpart and is not a precondition for any new deadline or schedule that is established.
156	Trudy Baker, Sidney, NY	I-6.1	Raises safety concerns about the management of "East Sidney Lake" by the Town of Sidney	This comment is beyond the scope of the proposed regulations and their implementing statute.
157	<a href="mailto:abcdef1_2@netzero.net">abcdef1_2@netzero.net</a>	I-7.1	Has DEC considered the loss to the environment if a significant number of dams are deactivated and drained as a result of your program which puts the entire burden for repairs and maintenance on the owner. Cost of compliance issues and funding options should be incorporated in any long term plan.	NYSDEC provided a response in May 2009 (see Frequent Comment #9 contained in the Assessment of Public Comments that accompanied the revised rulemaking).
158	Randy Preston, Town of Wilmington	L-1.1	Opposes any new Regulations which in the end results in the cost falling back onto the local property tax. These Regulations are being put out by people who have not been elected to their positions and new Regulations should not be issued without approval of elected officials. Someone needs to look at all the Regulations as a whole, and realize these are unfunded <u>mandates from unelected people</u> .	The objection concerns a statutory provision (ECL §15-0507), which is beyond the scope of the revised regulations.
159	Mark Watts, Chemung County S&WCD	L-2.1	Under Section 673.3 General Provisions letter (i) could Soil & Water Conservation Districts be added to this section? If through the Department review, Districts may want to take on this responsibility and could easily happen if added to this section. The final say would be on a case by case since it is at the discretion of the Department.	The referenced subpart addresses reports, previously prepared by or submitted to other government agencies. Such reports, if "equivalent" to reports required by these revised regulations, may be requested to be accepted in lieu of reports prepared solely pursuant to the revised dam safety regulations, and may be accepted by <u>NYSDEC at its discretion</u> .
160		L-2.2	Under 673.5 Hazard Classifications letters (d) & (e). There should some type of program to financially help with the increased responsibility. The way the regulations read today, it penalizes landowners who have no say on downstream development but yet if it occurs they have additional responsibilities for a B or C dam under the proposed regulations.	Please see response to Frequent Comment #1.

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161		L-2.3	Under 673.16 Condition Ratings letter (i) Enhanced Safety Program #2 Financial Assurance. The way the District interprets this is that the financial assurance is only needed if it comes under the Enhanced Safety Program, which would come into play if the dam was not being maintained properly. Is this interpretation correct?	The interpretation of Part 673.16(i) offered by the commenter is correct.
162		L-2.4	Could the DEC develop worksheets for private landowners considering building a pond? These worksheets would have questions that a landowner could go through to determine if a dam permit is needed. For example, it would show how to determine the number of gallons impounded and also how to determine dike height.	This comment is beyond the scope of the proposed regulations and their implementing statute. Potential dam owners may contact the Department's Dam Safety Section within the Division of Water or the Division of Environmental Permits to obtain guidance for their particular project. In addition, guidance or worksheets may be developed concerning permitting.
163		L-2.5	Are state agencies which own dams exempt from the regulations? What compliance process will there be for State-owned dams? For example, in Chemung County there is a state owned Class B dam which has had flow out of its auxiliary spillway numerous times. Does the State agency which owns that dam need to inform DEC, as well as local officials about these events? Or will they be exempted from this requirement? If they are exempt, why would they be exempt? How would exemption protect the public and ensure continuation of the values created by these dams?	Please see response to Frequent Comment #5.
164	Paul V. Rush, NYCDEP	L-3.1	Part 608: Use and Protection of Waters: 608.1(c): As noted in Comments to Part 673, the proposed definition of "breach" only includes planned construction and/or operations activities. It should include events that cause an unplanned broach or, in the alternative, a definition for "dam failure" should be included.	Please see response to Frequent Comment #13.
165		L-3.10	608.6(b)(4): DEP interprets this to mean that all provisions of Part 673 must be met before a Dam Safety Permit will be issued. DEP believes there is a circular logic error here. Several permits may be required over an extended period to work towards complying with various provisions of Part 673. DEP feels this section needs to be clarified.	NYSDEC has reviewed subpart 608.6(b)(4). The regulations require up-to-date EAPs and Inspection and Maintenance Plans, and Annual Certifications for Class "B" and "C" dams independent of any project concerning the dam which may require a permit. For dams that are out of compliance, the steps toward compliance, including any permits that may be necessary, should be coordinated in the terms of a consent order.

Line #	Name/Organization	Comment Code	Comment Summary	Response
166		L-3.11	The term "normal impoundment capacity" should be defined and used as suggested by DEP in the proposed regulations. DEP suggests basing the definition on FEMA Document #48 - Glossary of Terms: 'normal impoundment capacity' means for a facility with a fixed overflow sill, it is the volume of water impounded at the normal water surface at the lowest crest level of that sill. For a facility whose outflow is controlled wholly or partially by movable gates, siphons or other means, it is the volume of water impounded at the maximum level to which water may rise under normal operating conditions, exclusive of any provision for flood surcharge.	Please see response to Frequent Comment #15.
167		L-3.12	The term "project", which is used throughout Parts 673, 608 and 621, is not defined within the regulations and should be with respect to both a newly proposed dam construction project and a project involving work on an existing dam.	An electronic search reveals that the term "project" is not used anywhere in revised Part 673. The term is used once in the revisions to Part 621, solely with respect to repairs. The term is used four times in subpart 608.6, and deals with the content of permit applications. The use of the term "project" is sufficiently clear as it relates to work that may serve as repair or that is the subject of an Article 15 permit application, respectively.
168		L-3.13	Part 621: Section 621.4 Requirements for specific permit applications: 621.4 (ii): Define 'ordinary maintenance' as given by DEP for Part 608.1(v) and Part 673.	A cross-reference to subpart 608.1(v) has been added to subpart 621.4(a)(2)(ii). Please see response to Frequent Comment #8.
169		L-3.14	621.4 (iii): Define the words 'minor' with respect to the definition of 'ordinary maintenance' provided by DEP for Parts 608.1(v) and 673.	The use and definition of the term "minor" is appropriate as drafted in the revised regulation.
170		L-3.15	Part 673: Dam Safety Regulations: 673.2 Definitions: 673.2(c): As noted in comments to Part 608.1(c), the proposed definition of "breach" only includes planned construction and/or operations activities. It should include events that cause an unplanned breach or, in the alternative, a definition for "dam failure" should be included.	Please see response to Frequent Comment # 13.
171		L-3.16	673.2(f): Assuming the intention is to exclude beaver dams from regulation, the word "artificial" should be replaced with "manmade". If the intention is to regulate beaver dams, the term should be defined and incorporated into the regulatory framework.	NYSDEC has reviewed subpart 673.2(f) reviewed and is deemed appropriate. The definition of "dam" is statutory, see ECL §15-0503.

Line #	Name/Organization	Comment Code	Comment Summary	Response
172		L-3.17	673.2(j): DEP suggests the current definition for EAP be replaced with the definition found in FEMA Doc-#64 - "Emergency Action Planning for Dam Owners". DEP suggests the new definition read; "Emergency Action Plan (EAP) is a formal document that identifies potential emergency conditions at a dam and specifies preplanned actions to be followed to minimize property damage and loss of life. The EAP specifies actions the dam owner should take to moderate or alleviate the problem at the dam. It contains procedures and information to assist the dam owner in issuing early warning and notification messages to responsible downstream emergency management authorities of the emergency situation. It also contains inundation maps to show the emergency management authorities of the critical areas for action in case of an emergency."	Please see response to Frequent Comment #2.
173		L-3.18	673.2 (k) (ii): Delete this entire section. DEP believes NYS Ed Law adequately defines provisions for an engineer's education and ability to practice in areas of expertise. This is adequately stated by DEC in Part 6732(k)(i).	Please see response to Frequent Comment #4.
174		L-3.19	673.2(p): Various state & federal standards define the word "flood" differently. DEC should cite standard or better define the term as used in this definition of 'inundation area' (e.g. two feet water rise above ambient stream conditions within one hour, above the XX year storm water flow levels, etc.)	The phrase, 'the area that would likely be flooded as the result of a dam failure', as used in subpart 673.2(p), is sufficiently clear. The NYSDEC is preparing guidance on the development of inundation maps in connection with Emergency Action Plans. See see response to Frequent Comment #2.
175		L-3.2	608.1(n): The words "at its highest point" at the end of the sentence should be removed.	Please see response to Frequent Comment #14.
176		L-3.20	673.2 (t): The inclusion of any person or local public corporation who "uses a dam" in the definition of "Owner" is overly broad and could easily be interpreted to subject to regulatory authority persons or entities engaged in activities that are outside the intended scope of these regulations.	Please see response to the May 20, 2009 Frequent Comment # 5.
177		L-3.21	673.2: Define the term "normal impoundment capacity" as stated in Part 608 above.	Please see response to Frequent Comment #15.
178		L-3.22	673.2: Define the term 'ordinary maintenance' to be consistent with Part 608(v) and using DEP suggested modifications above.	Please see response to Frequent Comment #8.
179		L-3.23	673.2: Define the term 'project' with respect to a newly proposed dam construction and a "project" on an existing dam.	The term "project" does not need to be defined in Part 673. An electronic search reveals that the term "project" is not used anywhere in revised Part 673.

Line #	Name/Organization	Comment Code	Comment Summary	Response
180		L-3.24	Hazard Classifications: 673.5 (a) (1): Insert the word "dam" before "height" and "normal" before "impoundment".	NYSDEC has reviewed subpart 673.5(a)(1). The phrase "of the dam" modifies all three elements in the preceding list ("...height, impoundment capacity, and physical characteristics of the dam"). NYSDEC disagrees with the use of "normal" before impoundment as it would change the meaning of the regulation.
181		L-3.25	673.5 (a) (2): insert the word "and" after the semicolon at the end of the phrase to clarify that these items are conjunctive.	The suggested change has been made.
182		L-3.26	673.5 (b): DEP suggests the following edited sentence to clarify the intent: The Hazard Classification for dams are assigned based on an analysis of the criteria set forth at 673.5 and, as such, not necessarily based on size alone.	NYSDEC respectfully disagrees with the commenter. The proposed language would change the meaning. As drafted, the NYSDEC can assign a hazard classification to dams below permit thresholds. This may be <u>necessary to protect public safety and life.</u>
183		L-3.27	673.6 Inspection Operation and Maintenance: 673.6 (a) (1) and (2): The commas at the end of each section should be semicolons.	The department respectfully disagrees with this style comment.
184		L-3.28	673.6 (a) (3): The time frame to completing the Maintenance Plan should be twenty-four (24) months rather than twelve (12).	Please see response to Frequent Comment #10.
185		L-3.29	673.6(b) (1) and (2): DEP suggests that DEC clarify that it is the dam owner or its representative that is responsible for the circulation of notification of deficiencies and potential deficiencies, and for establishing the schedule for monitoring, inspections and maintenance.	Please see response to Frequent Comment #10.
186		L-3.3	608.1(v): As noted in comments to Part 673, delete the words "ordinary maintenance is work involved in the routine or regular upkeep of a dam, and includes, by way of example only, activities such as debris removal, mowing grass, cleaning trash racks, and exercising valves," from the end of the sentence.	NYSDEC has reviewed subpart 608.1(v) and finds it to be appropriate as drafted.
187		L-3.30	613.7 Emergency Action; Emergency Action Plans: 673.7 (e) (3): DEP suggests the time frame for submitting an Emergency Action Plan should be extended to 24 months from the date of Hazard Classification assignment because this classification will effect several dams acquired by NYC under the Land Acquisition Program.	Please see response to Frequent Comment #2.
188		L-3.31	673.7(d) and (e): DEP is concerned that under the proposed definition of Engineer at 673.2 (k) (ii), DEP personnel who do not meet the specified criteria, although otherwise qualified to do so, might be prohibited from preparing all or parts the Emergency Action Plans required herein.	With respect to subpart 673.7(d), the provision expressly allows for a request for waiver. Subpart 673.7(e) does not impose an across-the-board requirement that an "engineer" (as defined in the revised regulations) prepare the EAP.

Line #	Name/Organization	Comment Code	Comment Summary	Response
189		L-3.32	673.8 Annual Certification: 673.8 (d): Items under (d) should be renumbered to (2), (3) and (4) instead of (a), (b) and (c).	The suggested change has been made.
190		L-3.33	673.12 Safety Inspections: 673.12 (a): DEP suggests that DEC should clarify that the dam owner shall determine the frequency of inspections in order to meet the "regular basis" standard.	The cited provision sets forth NYSDEC's intent that the dam owner is to "identify" in the Inspection and Maintenance Plan a schedule for Safety Inspections, which are to occur on a regular basis. Guidance is available on NYSDEC's website and updated guidance is being developed. NYSDEC retains the authority, as expressed in subpart 673.12, to require a schedule that includes more frequent inspections if conditions or <u>circumstances so require</u> .
191		L-3.34	673.12 (c): DEP is concerned that its own qualified personnel will be precluded from performing safety inspections if an Engineer, as defined in the proposed definition at 6732(k)(ii), is required to perform all levels of safety inspections under this section and, therefore, suggests the following change: "Safety Inspections shall be performed on behalf of the owner by a person competent to the level of inspection being performed, who shall document the results of each inspection in a Safety Inspection Report, which shall be signed and sealed by the engineer."	NYSDEC's intent is to require Safety Inspections by an engineer on a regular basis. Other, less formal inspections, may be performed more frequently by other personnel on behalf of the owner. Please see response to Frequent Comment #4.
192		L-3.35	673.12 (g): DEP suggests the time frame for resubmission of Safety Inspection Reports should be expanded from 60 to 90 days.	Sixty days has been generally found to be adequate. Extensions of time can compromise public safety in this context. Unique compliance schedules may be developed in the context of a consent order governing <u>multiple dams that are out of compliance.</u>
193		L-3.36	673.13 Engineering Assessment: 673.13 (a): DEP suggests that DEC clarify that it is the dam owner who determines the frequency of such engineering assessments in order to meet "regular basis" standard.	Subpart 673.13 specifies the frequency of Engineering Assessments. "Regular basis", as that term appears in subpart 673.13(a), is modified by "as is set forth in this subsection."
194		L-3.37	673.13 (e) (5): DEP suggests that the extension should be automatically granted by DEC in response to a written request where the dam is being operated in a safe condition and the applicant for the extension is not otherwise in violation of the intent of Parts 673, 621, or 608, rather than the request being <u>subject to DEC discretion.</u>	Each dam is unique, and extensions of time may be granted or denied in light of all of the facts and circumstances affecting public safety, including the physical characteristics and locale of the dam, in addition to the compliance of the owner.
195		L-3.38	673.13 (h): DEP suggests the time frame for resubmission be extended to 6 months.	Sixty days has been generally found to be adequate. Extensions of time can compromise public safety in this context. Unique compliance schedules may be developed in the context of a consent order governing <u>multiple dams that are out of compliance.</u>

Line #	Name/Organization	Comment Code	Comment Summary	Response
196		L-3.39	673.14 Field Inspection of a Dam by the Department: 673.14: DEP is concerned about security issues in connection with disclosure to the public of inspection reports and other documentation gathered in connection with inspections. We are, therefore, suggesting the inclusion of a section that enables the redaction of sensitive information in instances that <u>DEP determines necessary</u> .	Please see response to Frequent Comment #7.
197		L-3.4	608.1 (dd): Change the word "shanging" to "changing".	The cited misprint appears in the existing published version of Part 608 in NYCRR. The express terms in the Revised Regulation shows that this has been deleted (it appears within bracketed text) and corrected (as shown in <u>underlined text</u> ).
198		L-3.40	673.16 Condition Ratings: 673.16 (b) (2): DEP suggests deleting the words "...developing seepage problems" from the section. DEP believes that all dams "seep" and "develop seepage problems" over time. This should not be considered a single basis for defining a dam as "unsound" unless it has progressed to the point of threatening the structural stability of <u>the dam</u> .	NYSDEC has reviewed subpart 673.16(b)(2) and finds it to be appropriate as drafted. A seepage problem is not the same as "seepage" - The draft language is intended to reflect that seepage is not necessarily a "problem".
199		L-3.41	673.16 (b) (3) and (4): DEP believes, that the use of the word "significant" in (4) rightly implies that "minor" deficiencies may be found without changing DEC's rating of the dam as "No Deficiencies Noted". This appears to conflict with DEC's use of the word "minor" in (3). DEP believes that using the word "minor" in (3) will likely cause dams to be unduly labeled "Deficiently Maintained." DEP therefore suggests that "minor" in (3) be changed to "significant."	Please see response to Frequent Comment #9.
200		L-3.42	673.16(i) (1) (iii): DEP suggests that the use of the term "reservoir restrictions" be clarified.	NYSDEC has reviewed subpart 673.16(i)(1)(iii) and finds it to be appropriate as drafted. The term 'reservoir restrictions' generally refers to a temporary target water surface elevation that is lower than normal.
201		L-3.43	673.16(j): DEP suggests that the timeframe for a dam owner to contest a Condition Rating be changed from 30 days to 90 <u>days</u> .	Please see response to Frequent Comment #9.
202		L-3.5	608.3(b)(1) and (2): Change the term "...maximum impoundment capacity" to the term ".. normal pool impoundment capacity". The use of the term "normal pool" will make this definition consistent with DEC's use of this term in Part 673.13(e) and DEP believes would better reflect the intent <u>of the regulation</u> .	Please see response to Frequent Comment # 15.

Line #	Name/Organization	Comment Code	Comment Summary	Response
203		L-3.6	608.6 (b)(1): Add the words "Based on the nature of the actions to be performed as determined by the Department," to the beginning of the first sentence.	NYSDEC has reviewed subpart 608.6(b)(1) and finds it to be appropriate in defining minimum permit application standards. Permits are required for work beyond maintenance.
204		L-3.7	608.6(b)(1): Change the word "shall" to the word "may" in the first sentence.	NYSDEC has reviewed subpart 608.6(b)(1) and finds it to be appropriate in defining minimum permit application standards. Permits are required for work beyond maintenance.
205		L-3.8	608.6(b)(1)(ii): Add the words "as relevant and necessary to the proposed project" to the end of the sentence.	NYSDEC has reviewed subpart 608.6(b)(1)(ii) and finds it correctly states the need for a complete review of the dam's design and, if applicable, the impact of the proposed changes on the dam.
206		L-3.9	608.6(b)(1)(ii) (c), (d) & (e): Add the words "as relevant and necessary to the proposed project" to the end of each of these sentences.	NYSDEC has reviewed subparts 608.6(b)(1)(ii), (c), (d) & (e) and finds they correctly state the need for a complete review of the dam's design and, if applicable, the impact of the proposed changes on the dam.
207	Jane W. Blair, PE, NYS Board of Engineering and Land Surveying	S-1.1	NYCRR Part 608 Use and Protection of Waters; Part 608.1 Definitions: (n) 'Height': consider revisions to the definition where "lowest point" is described in terms of the pre-dam topography. DEC may also want to consider utilizing U.S. Army Corp of Engineers and FEMA definitions for the hydraulic height, the structural height, etc. as these definitions may assist in a consistent meaning in the dam engineering community	Please see response to Frequent Comment #14.
208		S-1.10	NYCRR Part 673.2 Definitions: (r) 'Maximum impoundment capacity': consider adding some clarifying language to the end of the sentence: ", including during periods when a temporary surcharge pool exists."	Please see response to Frequent Comment #15.
209		S-1.11	NYCRR Part 673.2 Definitions: Between (w) and (x), consider adding a definition for "Surcharge Pool" with respect to the loading conditions that are typically analyzed during stability analyses. A suggested definition could be developed utilizing the U.S. Army Corps documents.	NYSDEC considered U.S. Army Corp and FEMA provisions, including definitions, during the course of this rule making, as well as the provisions of many states, and finds the cited definition to be appropriate as drafted. The 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. The addition of a definition for "Surcharge Pool" is not necessary and may introduce confusion as it is not used elsewhere in New York's dam safety program.

Line #	Name/Organization	Comment Code	Comment Summary	Response
210		S-1.12	Part 673.12 Safety Inspections: (d), (4), after "..., stability analysis", consider adding "seepage analysis".	NYSDEC has reviewed subpart 673.12 and finds the cited provisions to be appropriate as drafted. The cited list of additional investigations is illustrative (set off with "such as"... ) rather than all-inclusive, and a seepage analysis may be required as is identified in the NYSDEC's "Guidelines for the Design of Dams, Revised January 1989".
211		S-1.13	Part 673.12 Engineering Assessments: Please refer to our comment for 673.2 Definitions, (k) 'Engineer', (ii), in terms of the qualifications of the engineer working on High Hazard dams	Please see response to Frequent Comment #4.
212		S-1.14	Part 673.12 Engineering Assessments: f), (2): After "..., structural stability", consider adding ", seepage control features," and then in the second line of the sentence consider adding ", seepage" after the word "hydraulic,".	Engineering Assessments are addressed primarily in subpart 673.13. NYSDEC has reviewed subpart 673.13.(f)(2) and finds it to be appropriate as drafted. The cited list is not exclusive of other elements to be evaluated in an Engineering Assessment, such as seepage control features. The evaluation of "seepage control features" is indeed an integral part of a dam's design (see, for example, NYSDEC's guidance on dam design (revised 1989), which is available on NYSDEC's website).
213		S-1.2	NYCRR Part 608 Use and Protection of Waters; Part 608.1 Definitions: (q) 'Maximum impoundment capacity': consider adding some clarifying language to the end of the sentence: ", including during periods when a temporary surcharge pool exists."	Please see response to Frequent Comment #15.
214		S-1.3	NYCRR Part 608 Use and Protection of Waters; Part 608.1 Definitions: (gg) 'Substantial reconstruction of structures': consider an extension to the definition such as "or in instances when the restoration or rebuilding alters the function of the structure."	The comment does not address NYSDEC's May 2009 revisions to the 2008 proposed regulations and is therefore beyond the scope of this Assessment. The only change to subpart 608.1(gg) was a clarification that (gg) does not apply to dams. Only dams (versus the other structures addressed in Part 608) are the subject of this rule making.
215		S-1.4	Part 608.6 Permit application procedures: ('d'): consider adding "and seepage control features." to the end of the subdivision as seepage related dam failures and incidents may be more common than stability failures.	NYSDEC has reviewed subpart 608.6(d) and finds it to be appropriate as drafted. NYSDEC considers the evaluation of "seepage control features" an integral part of the dam's design and, as such, does not need to be specifically included in the proposed language. For example, NYSDEC's "Guidelines for the Design of Dams, Revised January 1989" provides seepage control requirements when designing dams.

Line #	Name/Organization	Comment Code	Comment Summary	Response
216		S-1.5	NYCRR Part 673.2 Definitions: (c) 'Breach': consider adding some clarifying language to the end of the definition "...conducted in such a way that the dam loses the ability to impound water under normal operating conditions.'	Please see response to Frequent Comment #13.
217		S-1.6	NYCRR Part 673.2 Definitions: (f) 'Dam': consider revising the definition by removing "...is not a dam", and adding "is not regulated as a dam as governed by this Part." Also consider making reference to where the lagoon type facilities are regulated. Finally, we have been told that engineers have followed dam safety engineering standards when developing structural designs for lagoons used for storage of large volumes of water (e.g., spray irrigation water) or for lagoons used to store specific liquids (e.g., ash waste, animal waste, etc.) in other jurisdictions in the U.S. That should be considered when finalizing the revised proposed dam safety rules and regulations.	NYSDEC has reviewed subpart 673.2(f) and finds it to be appropriate as drafted. The definitions of "dam" and "waters" are statutory, and are carried into the revised regulation as such. NYSDEC generally declines to provide cross-references to other regulatory programs (e.g., those other than dam safety and permitting) within the published dam safety regulations, as these cross-references may change. The suggestion to introduce dam safety regulations into the lagoon construction provisions of other rules is noted.
218		S-1.7	NYCRR Part 673.2 Definitions: Between (i) and (j), consider adding a definition for "Drawdown" with respect to the DEC needing to order a dam owner to temporarily drawdown a reservoir to decrease a hazard that may exist. In doing so the public safety mission may be better fulfilled until the deficiency can be corrected. This additional definition may also assist to differentiate the intended change in the impoundment level from what would result if the dam was breached (as defined separately).	NYSDEC has reviewed the cited language of subpart 673.2 and finds it to be appropriate as drafted. Subpart 673.16(i)(1)(iii) allows NYSDEC to make reservoir restrictions part of an Enhanced Safety Program should the temporary drawdown of a reservoir become necessary in order to protect public safety.
219		S-1.8	NYCRR Part 673.2 Definitions: (k) 'Engineer', (ii): reconsider the change to the qualification of the Engineer who will be inspecting High Hazard dams. As before, to help ensure public safety, we support DEC's requirement that the Engineer must have 10 years of related experience.	Please see response to Frequent Comment #4.
220		S-1.9	NYCRR Part 673.2 Definitions: (f) 'Height': consider revisions to the definition where "lowest point" is described in terms of the predam topography. DEC may also want to consider utilizing U.S. Army Corp of Engineers and FEMA definitions for the hydraulic height, the structural height, etc. as these definitions may assist in a consistent meaning in the dam engineering community.	Please see response to Frequent Comment # 14.

Line #	Name/Organization	Comment Code	Comment Summary	Response
221	Christopher Waite, PE, NYS Thruway Authority/NYS Canal Corporation	S-2.1	As a public benefit corporation whose assets are owned by the people of the State of New York, should be evaluated differently from those other local governmental and/or privately-owned facilities. Implementation of these duplicative and unnecessarily burdensome proposed requirements would create the need for considerably more staff and financial resources. Staffing and funding levels will be severely impacted with these newly proposed additional regulatory requirements	Please see responses to Frequent Comments #1 and #5.
222		S-2.10	6 NYCRR Part 673.6 requires owners of any low hazard dams above the permitting thresholds in Part 673.5, as well as owners of intermediate and high hazard dams to develop and fully implement a written O&M Plan. Again, this is not only costly for individual dam owners, but, due to the number of dams on the Canal System, it would be extremely costly for the Corporation as well. Further, the Corporation presently operates and maintains 25 intermediate hazard dams. It will be impossible to meet the proposed regulatory schedule for these dams. An alternate schedule/phase-in period is necessary if this requirement is to be implemented for the entire Canal System. This could be exacerbated if the proposed regulations increase the number of dams regulated by the DEC.	Please see response to Frequent Comment # 10. Unique compliance schedules may be developed in the context of a consent order governing multiple dams that are out of compliance.
223		S-2.11	6 NYCRR Part 673.12: It is the responsibility of DEC to oversee the program by continuing to perform technical dam safety inspections. The increased inspection frequency requirement on the dam owners is arbitrary and onerous. These requirements are especially burdensome for the Corporation given the number of low, intermediate, and high hazard dams under the Corporation's jurisdiction	Please see response to Frequent Response #1.
224		S-2.12	6 NYCRR Part 673.16(l): DEC should provide more examples of what it considers to be satisfactory financial security. Any dam held in the name of the people of the State of New York should represent sufficient financial security and the regulations should be modified to account for this detail. Otherwise, at a minimum, public entities that are self-insured should be allowed to use a "global" financial security package. This would show that rather than coverage on an individual dam basis, the Corporation provides coverage for any individual occurrence on State-owned facilities under Corporation jurisdiction. The prospect of providing financial security for a failure on all facilities would not be supported by a risk management assessment	Please see response to Frequent Comment #6.

Line #	Name/Organization	Comment Code	Comment Summary	Response
225		S-2.13	6 NYCRR Part 673.17(e): The Corporation is exempt from paying local and county taxes. Additionally, liens cannot be placed on property held in the name of the people of the State of New York. As such, this provision cannot be applied to the Corporation and/or Thruway Authority; therefore, these entities should be exempt from this enforcement mechanism.	Taxing is one among "other" cost recovery mechanisms mentioned.
226		S-2.14	6 NYCRR Part 621.4: Elimination of minor dam projects as a classification under Uniform Procedures Act (UPA) is unnecessary. A history of the Corporation's routine maintenance activities does not show that there is regulatory benefit by classifying these activities as a major dam project under the UPA. It is the Corporation's experience that these activities, which have been undertaken as minor projects, have not compromised the integrity of dams under the jurisdiction of the Corporation and therefore the proposed regulatory revision is arbitrary.	Please see response to Frequent Comment #8.
227		S-2.15	Cost Assessment: The frequencies of the proposed requirements are new and appear to be arbitrary. The cost will be significantly increased from current requirements. In the RIS, DEC inaccurately asserts that these new requirements are normal operational costs and therefore should not be considered. Unquestionably, these new requirements have substantial financial consequences to the Corporation, which must be considered in the RIS. The Regulatory Impact Statement should be re-visited to discuss total economic impacts, not only to the Corporation but also to state and local governments, as well as private dam owners across the state.	Please see response to Frequent Response #1.
228		S-2.16	Federal Preemption: The proposed regulations fail to mention the FERC's licensee requirements associated with FERC's Dam Safety Program and do not address the inconsistencies between these two programs. Often the owner of the dam and the FERC licensee are not the same entity. FERC's regulatory guidance on EAPs (Chapter 6) provides that in these cases the licensee should coordinate with the owner of the dam to develop an EAP. Should DEC determine the state is not preempted from regulating hydropower facilities, the proposed regulations should exempt the requirements for those facilities currently subject to a FERC license. A failure to provide such a provision will result in inconsistent information being developed and filed to satisfy uncoordinated state and federal requirements.	The Department provided a response in May 2009 (see Frequent Comment #8 contained in the Assessment of Public Comments that accompanied the revised rulemaking). The revised dam safety regulations (see, for example, subpart 673.3(i)) provide flexibility for dams regulated by other government agencies.

Line #	Name/Organization	Comment Code	Comment Summary	Response
229		S-2.17	While development downstream of existing dams may be desirable from an economic development perspective, the development may result in a change in the hazard classification without consideration of the existing dam or even the dam owners input or knowledge. DEC should modify its SEQRA procedures to acknowledge downstream development may result in a change in hazard classification of an existing dam creating regulatory and economic hardship for the owner.	The comment is outside the scope of the rule making.
230		S-2.2	Recommends that State Agencies, Authorities and Public Benefit Corporations be expressly exempted from all requirements for financial security, inspection, certification and reporting in Part 673. This exception can be based on the submission of an acceptable financial demonstration package and a reasonable inspection and reporting program. The Corporation would be willing to work with the Department to develop a programmatic plan that would address the technical requirements necessary to implement the Canal System's operation and maintenance. This plan would provide a comparable level of protection while reducing the rigorous formalities that the proposed regulations would create for both the Department and the Corporation.	Please see responses to Frequent Comments #1 and #5.
231		S-2.3	The broad definition of "dam" could be interpreted to include Canal structures which historically have been subject to our normal structural inspection and maintenance program but not regulated through NYCRR Parts 673 or 608. It is recommended that the definition of a dam be revised to "Dam means any artificial wall barrier, including any earthen wall barrier, together with its appurtenant works, built across a watercourse with the purpose to impound waters." This definition would eliminate the above-mentioned canal structures.	The definition of "dam" is statutory. Some dams impound waters without crossing water bodies. Canals that impound waters may be "dams" under the definitions in ECL §15-0503(1)(a) and in 6 NYCRR Parts 673 and 608.

Line #	Name/Organization	Comment Code	Comment Summary	Response
232		S-2.4	The proposed rulemaking provides a table referencing cost estimates for proposed engineering services. This is not an accurate economic impact of these proposed regulations as required by GORR's regulatory impact statement (RIS). DEC has erroneously assumed that there will be limited impact on the regulated community and should re-evaluate costs of these newly proposed regulations on the Corporation, other state and local agencies, and the private dam owners across the state. Administrative costs as well as projected dam improvements should be included into this evaluation. These impacts will be significant and must be addressed during the rulemaking process.	Please see response to Frequent Comment # 1.
233		S-2.5	Previous proposed NYCRR Part 673 1(j) is now 673 1(t). The definition of Dam Owner did not previously include State Public Benefit Corporations, such as the Canal Corporation. In 673.1(t) the regulations now have a provision to include local public corporations as owners of dams. The Canal Corporation, as a state public corporation, holds property in the name of the people of the State of New York; therefore, the dams under the jurisdiction of the Corporation should identify the owner as the <u>State of New York</u> .	Please see response to Public Comment #5.
234		S-2.6	NYCRR Part 673.5: It is unclear how DEC classifies "important utilities." The regulations should clearly define what the DEC means by important utilities. There is considerable uncertainty regarding the level of importance determined by the amount of residents and businesses that the utility serves and the importance of prolonged impacts on the utility or short-term disruptions if a dam were to be breached.	Please see response to Frequent Comment #3.
235		S-2.7	NYCRR Part 673.6, 673.7 and 673.8: EAPs and Operation and Maintenance Plans have not been developed for the Corporation's intermediate hazard dams. Given the constraints of limited funding and the consultant designation process, it is impossible to comply with the mandates of these proposed regulations. At a minimum, consideration is sought for extending the schedule time frames for development and implementation of these plans for the Corporation's <u>intermediate hazard dams</u> .	Noted. Unique compliance schedules may be developed in the context of a consent order governing multiple dams that are out of compliance.

Line #	Name/Organization	Comment Code	Comment Summary	Response
236		S-2.8	As the EAP's are dam-specific documents that require appropriate technical backup, the development of the plan is limited to the use of an outside consultant. This is not only costly for the smaller dam owners, but due to the magnitude of the impact to the Canal System, it would represent a significant financial hardship for the state as well. It would be helpful prior to implementation of this requirement for the DEC to develop a cost estimate associated with the statewide implementation of <u>this regulation</u>	Please see response to Frequent Comment #2.
237		S-2.9	It is also unreasonable to require a corporate officer to certify technical requirements of a dam, in that most corporate officers are neither engineers nor dam safety experts. The certification of the corporate officer should be structured such that they are attesting only to the performance of the work and the corporate acceptance of the submittal.	NYSDEC respectfully disagrees. A form for the Annual Certification (see Subpart 673.8) is being prepared.

# SECOND ASSESSMENT OF PUBLIC COMMENT

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## PART VII

### COMPLETE COPIES OF ALL COMMENTS AND TRANSCRIPTS

(Coded as indicated in Chapter V, Index)

A single CD of the entire rule making package is available at no charge upon request by writing to the address below or by calling the Department at: 518-402-8151. The CD includes Chapter VII to the Second Assessment of Public Comment, which was too large to be uploaded to the DEC Website.

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