



VIRGINIA SOIL AND WATER CONSERVATION BOARD GUIDANCE DOCUMENT ON IMPOUNDING STRUCTURE OWNERSHIP

(Approved September 25, 2008)

Summary:

This guidance document serves to clarify who may be considered the “owner” of an “impounding structure” that is responsible for the operation and maintenance of such impounding structure.

Electronic Copy:

An electronic copy of this guidance in PDF format is available on the Regulatory TownHall under the Virginia Soil and Water Conservation Board at: <http://townhall.virginia.gov/L/GDocs.cfm>. An electronic copy is also available on the Virginia Department of Conservation and Recreation’s Division of Dam Safety and Floodplain Management website at: http://www.dcr.virginia.gov/dam_safety_and_floodplains/index.shtml.

Contact Information:

The Virginia Department of Conservation and Recreation’s Division of Dam Safety and Floodplain Management may be contacted with any questions regarding the application of this guidance at dam@dcr.virginia.gov or by calling 804-371-6095.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the Virginia Soil and Water Conservation Board (Board) and the Department of Conservation and Recreation that administers the Dam Safety Program on behalf of the Board. This guidance provides a general interpretation of the applicable Code sections and Board regulations but is not meant to be exhaustive in nature. Each situation may differ and may require additional interpretation of the Dam Safety Act and attendant regulations.

Impounding Structure (Dam) Ownership

I. Background:

Section 10.1-604 of Virginia Dam Safety Act states that an “owner” means “the owner of the land on which a dam [impounding structure] is situated, the holder of an easement permitting the construction of a dam [impounding structure] and any person or entity agreeing to maintain a dam [impounding structure]”. The Impounding Structure Regulations further define “owner” in 4VAC50-20-30 to include the Commonwealth or any of its political subdivisions, including but not limited to sanitation district commissions and authorities, any public or private institutions, corporations, associations, firms or companies organized or existing under the laws of this Commonwealth or any other state or country, as well as any person or group of persons acting individually or as a group. As explained above, the purpose of this guidance is to set forth the

Board's standard operating procedures and general interpretation of the applicable Code sections and Regulations concerning impounding structure ownership.

II. Definitions (pursuant to §10.1-604 and 4VAC50-20-30):

"Impounding structure" or "dam" means a man-made structure, whether a dam across a watercourse or structure outside a watercourse, used or to be used to retain or store waters or other materials. The term includes: (i) all dams that are 25 feet or greater in height and that create an impoundment capacity of 15 acre-feet or greater, and (ii) all dams that are six feet or greater in height and that create an impoundment capacity of 50 acre-feet or greater. The term "impounding structure" shall not include: (a) dams licensed by the State Corporation Commission that are subject to a safety inspection program; (b) dams owned or licensed by the United States government; (c) dams operated primarily for agricultural purposes which are less than 25 feet in height or which create a maximum impoundment capacity smaller than 100 acre-feet; (d) water or silt retaining dams approved pursuant to §45.1-222 or §45.1-225.1 of the Code of Virginia; or (e) obstructions in a canal used to raise or lower water.

"Owner" means the owner of the land on which an impounding structure is situated, the holder of an easement permitting the construction of an impounding structure and any person or entity agreeing to maintain an impounding structure. The term "owner" may include the Commonwealth or any of its political subdivisions, including but not limited to sanitation district commissions and authorities, any public or private institutions, corporations, associations, firms or companies organized or existing under the laws of this Commonwealth or any other state or country, as well as any person or group of persons acting individually or as a group.

III. Authority:

The Dam Safety Act in the Code of Virginia contains the following authorities applicable to this guidance:

§ 10.1-605. Promulgation of regulations by the Board.

The Board shall promulgate regulations to ensure that impounding structures in the Commonwealth are properly and safely constructed, maintained and operated.

§ 10.1-605.1 Delegation of powers and duties.

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

§ 10.1-613.4 Liability of owner or operator.

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

Compliance with this article does not guarantee the safety of a dam or relieve the owner of liability in case of a dam failure.

The Impounding Structure Regulations contain the following authorities applicable to this guidance (pertinent part included):

4VAC50-20-105. Regular Operation and Maintenance Certificates.

A. A Regular Operation and Maintenance Certificate is required for an impounding structure. Such six-year certificates shall include the following based on hazard classification:

1. High Hazard Potential Regular Operation and Maintenance Certificate;
2. Significant Hazard Potential Regular Operation and Maintenance Certificate; or
3. Low Hazard Potential Regular Operation and Maintenance Certificate.

B. The owner of an impounding structure shall apply for the renewal of the six-year Regular Operation and Maintenance Certificate 90 days prior to its expiration. If a Regular Operation and Maintenance Certificate is not renewed as required, the board shall take appropriate enforcement action.

IV. Discussion and Interpretation:

Under the first part of the definition of “owner” set forth in § 10.1-604 of the Code of Virginia, the individual(s) or entities owning the land on which a dam is situated is/are the fee simple owner(s) of the property underlying the dam. The fee simple ownership is determined from the deed(s) recorded in the local city and/or county courthouse/land records office. Before the Board can issue the dam owner(s) certificates and permits to operate the dam in compliance with state law, the dam owner(s) must complete and sign the appropriate Dam Safety Program documents. These documents may include an Operation and Maintenance Application, a Transfer Form, an Emergency Action Plan or Emergency Preparedness Plan, any necessary Design, Record, or Inspection Reports, and any other such documents as may be prescribed by the Board’s regulations.

Under the second part of the definition, in order for the holder of an easement developed for the purpose of permitting the construction of a dam to be considered the “owner” of the dam, the easement must be set forth in a deed between the identified fee simple dam owner(s) as grantor(s) and an identified grantee (which can be an individual or a legal entity). An acceptable deed must bear the appropriate signatures for all parties and be recorded in the local city and/or county courthouse/land records office.

Under the third part of the definition, an individual or entity may agree in writing to maintain and be responsible for a dam and therefore be considered by the Board to be the “owner” of the dam for purposes of the Dam Safety Act. Such a finding requires a clear, enforceable agreement between the individual or entity and the fee simple owner(s) of the dam. While a recorded agreement is not required for an ownership finding to be made under this part, a recorded agreement and easement allowing access to the dam location are considered strong indications of an enforceable agreement between the individual or entity and the fee simple owner(s) of the dam.

The term “entity”, as it is used in this document, includes both public entities (such as state agencies, local governments, soil and water conservation districts, and other such public bodies) and private entities. A private entity (e. g. homeowners’ association, property owners’ association, corporation, limited liability company, etc.) wishing to be considered an owner of a dam should be a legal entity registered with the State Corporation Commission. The entity should have recorded written covenants at the appropriate courthouse which state: 1) that all owners of record in the subdivision are uniting to create restrictions on the use of their land, and such covenants and restrictions are to run with the land; 2) that the property owners agree that the entity is responsible for dam maintenance and repair; and 3) that the entity has the authority to collect assessments from its members for dam maintenance in such amount to allow dam safety standards to be met in a reasonable timeframe.

NOTE: Any property owners wishing to form a homeowners' association, corporation, etc., for the purposes of assuming responsibility for impounding structure maintenance are advised to contact an attorney to draft the necessary documents with the appropriate provisions.

Irrespective of the second and third parts of the definition of “owner”, the Board may elect to seek compliance from the fee simple owners of the land on which a dam is situated if that is the simplest and/or clearest option.

V. Adoption, Amendments, and Repeal:

This document was adopted by the Board on September 25, 2008 and may be amended or repealed as necessary by the Board.