

COMPILATION OF STATUTES  
REGARDING THE  
**DEPARTMENT OF NATURAL RESOURCES**

**SAFETY OF DAMS AND RESERVOIRS**

- Includes:
- I. Chapter 46, Article 16: Safety of Dams and Reservoirs
  - II. Neb. Rev. Stat. §§ 54-2429 & 54-2430: Livestock Waste Management Act
  - III. Neb. Rev. Stat. § 2-3257: Natural Resources Districts
  - IV. Neb. Rev. Stat. § 37-807: Nongame and Endangered Species Act
  - V. Neb. Rev. Stat. § 56-101: Milldams
  - VI. Neb. Rev. Stat. § 28-106: Classification of penalties

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## CHAPTER 46

### ARTICLE 16

#### SAFETY OF DAMS AND RESERVOIRS

##### **46-1601. Act, how cited.**

Sections 46-1601 to 46-1670 shall be known and may be cited as the Safety of Dams and Reservoirs Act.

**Source:** Laws 2005, LB 335, § 1.

##### **46-1602. Definitions, where found.**

For purposes of the Safety of Dams and Reservoirs Act, the definitions found in sections 46-1603 to 46-1634 apply.

**Source:** Laws 2005, LB 335, § 2.

##### **46-1603. Abandonment, defined.**

Abandonment means the process of rendering a dam incapable of impounding by (1) dewatering and filling the reservoir created by such dam with solid materials and (2) creating a stable watercourse around the site.

**Source:** Laws 2005, LB 335, § 3.

##### **46-1604. Adverse consequences, defined.**

Adverse consequences means negative impacts that may occur upstream, downstream, or at locations remote from the dam, including, but not limited to, loss of human life, economic loss including property damage, and lifeline disruption.

**Source:** Laws 2005, LB 335, § 4.

##### **46-1605. Alterations, defined.**

Alterations means alterations to an existing dam that directly affect the safety of the dam or reservoir, as determined by the department, but does not include maintenance and repair of the dam to retain its initial structural integrity.

**Source:** Laws 2005, LB 335, § 5.

**46-1606. Application approval, defined.**

Application approval means authorization in writing issued by the department to an owner who has applied to the department for permission to construct, reconstruct, enlarge, alter, breach, remove, or abandon a dam and which specifies the conditions or limitations under which work is to be performed by the owner or under which approval is granted.

**Source:** Laws 2005, LB 335, § 6.

**46-1607. Approval to operate, defined.**

Approval to operate means authorization in writing issued by the department to an owner who has completed construction, reconstruction, enlargement, or alteration of a dam.

**Source:** Laws 2005, LB 335, § 7.

**46-1608. Appurtenant works, defined.**

Appurtenant works include, but are not limited to: Structures such as spillways, either in or separate from the dam; the reservoir and its rim; low-level outlet works; and water conduits including, but not limited to, tunnels, pipelines, or penstocks, either through the dam or its abutments.

**Source:** Laws 2005, LB 335, § 8.

**46-1609. Breach, defined.**

Breach means partial removal of a dam creating a channel through the dam to the natural bed elevation of the stream.

**Source:** Laws 2005, LB 335, § 9.

**46-1610. Completion certification, defined.**

Completion certification means a statement signed by the design engineer, certifying the completion of work on a dam in conformance with the approved plans and specifications.

**Source:** Laws 2005, LB 335, § 10.

**46-1611. Dam, defined.**

(1) Dam means any artificial barrier, including appurtenant works, with the ability to impound water, wastewater, or liquid-borne materials and which (a) is twenty-five feet or more in height from the natural bed of the stream or watercourse measured at the downstream toe of the barrier, or from the lowest elevation of the outside limit of the barrier if it is not across a

stream channel or watercourse, to the maximum storage elevation or (b) has an impounding capacity at maximum storage elevation of fifty acre-feet or more, except that any barrier described in this subsection which is not in excess of six feet in height or which has an impounding capacity at maximum storage elevation of not greater than fifteen acre-feet shall be exempt, unless such barrier, due to its location or other physical characteristics, is classified as a high hazard potential dam.

(2) Dam does not include:

(a) An obstruction in a canal used to raise or lower water;

(b) A fill or structure for highway or railroad use, but if such structure serves, either primarily or secondarily, additional purposes commonly associated with dams it shall be subject to review by the department;

(c) Canals, including the diversion structure, and levees; or

(d) Water storage or evaporation ponds regulated by the United States Nuclear Regulatory Commission.

**Source:** Laws 2005, LB 335, § 11.

**46-1612. Days, defined.**

Days, for purposes of establishing deadlines, means calendar days, including Sundays and holidays.

**Source:** Laws 2005, LB 335, § 12.

**46-1613. Department, defined.**

Department means the Department of Natural Resources.

**Source:** Laws 2005, LB 335, § 13.

**46-1614. Director, defined.**

Director means the Director of Natural Resources.

**Source:** Laws 2005, LB 335, § 14.

**46-1615. Emergency, defined.**

Emergency includes, but is not limited to, breaches and all conditions leading to or causing a breach, overtopping, or any other condition in a dam that may be construed as unsafe or threatening to life.

**Source:** Laws 2005, LB 335, § 15.

**46-1616. Engineer, defined.**

Engineer means a professional engineer licensed under the Engineers and Architects Regulation Act who (1) is competent in areas related to dam investigation, design, construction, and operation for the type of dam being investigated, designed, constructed, or operated, (2) has at least four years of relevant experience in investigation, design, construction, reconstruction, enlargement, alteration, breach, removal, or abandonment of dams, and (3) understands adverse consequences and dam failures.

**Source:** Laws 2005, LB 335, § 16.

**Cross Reference**

**Engineers and Architects Regulation Act**, see section 81-3401.

**46-1617. Enlargement, defined.**

Enlargement means any change in or addition to an existing dam which raises or may raise the normal storage elevation of the water impounded by the dam.

**Source:** Laws 2005, LB 335, § 17.

**46-1618. Hazard potential classification, defined.**

Hazard potential classification means classification of dams according to the degree of incremental adverse consequences of a failure or misoperation of a dam but does not reflect on the current condition of a dam, including, but not limited to, safety, structural integrity, or flood routing capacity.

**Source:** Laws 2005, LB 335, § 18.

**46-1619. High hazard potential, defined.**

High hazard potential means a hazard potential classification such that failure or misoperation of the dam resulting in loss of human life is probable.

**Source:** Laws 2005, LB 335, § 19.

**46-1620. Incremental, defined.**

Incremental means the difference in impacts that would occur due to failure or misoperation of the dam over the impacts that would occur without failure or misoperation of the dam.

**Source:** Laws 2005, LB 335, § 20.

**46-1621. Low hazard potential, defined.**

Low hazard potential means a hazard potential classification such that failure or misoperation of the dam would result in no probable loss of human life and in low economic loss.

**Source:** Laws 2005, LB 335, § 21.

**46-1622. Maximum storage, defined.**

Maximum storage means the reservoir storage capacity between the top of dam elevation, or the maximum routed elevation of the probable maximum flood if lower than the top of dam elevation, and the lowest downstream toe or outside limit elevation of the dam.

**Source:** Laws 2005, LB 335, § 22.

**46-1623. Minimal hazard potential, defined.**

Minimal hazard potential means a hazard potential classification such that failure or misoperation of the dam would likely result in no economic loss beyond the cost of the structure itself and losses principally limited to the owner's property.

**Source:** Laws 2005, LB 335, § 23.

**46-1624. Normal storage, defined.**

Normal storage means the reservoir storage capacity, excluding flood storage and freeboard allowances.

**Source:** Laws 2005, LB 335, § 24.

**46-1625. Owner, defined.**

Owner includes any of the following who or which owns, controls, manages, or proposes to construct, reconstruct, enlarge, alter, breach, remove, or abandon a dam:

- (1) The United States Government and its departments, agencies, and bureaus;
  - (2) The state and its departments, institutions, agencies, and political subdivisions;
  - (3) A municipal or quasi-municipal corporation;
  - (4) A public utility;
  - (5) A district;
  - (6) A person;
  - (7) A duly authorized agent, lessee, or trustee of any person or entity listed in this section;
- and
- (8) A receiver or trustee appointed by a court for any person or entity listed in this section.

**Source:** Laws 2005, LB 335, § 25.

**46-1626. Person, defined.**

Person means any individual, partnership, limited liability company, association, public or private corporation, trustee, receiver, assignee, agent, municipality, other political subdivision, public agency, or other legal entity or any officer or governing or managing body of any public or private corporation, municipality, other political subdivision, public agency, or other legal entity.

**Source:** Laws 2005, LB 335, § 26.

**46-1627. Probable, defined.**

Probable means likely to occur and reasonably expected.

**Source:** Laws 2005, LB 335, § 27.

**46-1628. Probable maximum flood, defined.**

Probable maximum flood means the most severe flood that is considered probable at a site.

**Source:** Laws 2005, LB 335, § 28.

**46-1629. Reconstruction, defined.**

Reconstruction means partial or complete removal and replacement of an existing dam.

**Source:** Laws 2005, LB 335, § 29.

**46-1630. Removal, defined.**

Removal means complete elimination of the dam embankment or structure to restore the approximate original topographic contours of the site.

**Source:** Laws 2005, LB 335, § 30.

**46-1631. Reservoir, defined.**

Reservoir means any basin which contains or will contain impounded water, wastewater, or liquid-borne materials by virtue of such water, wastewater, or liquid-borne materials having been impounded by a dam.

**Source:** Laws 2005, LB 335, § 31.

**46-1632. Significant hazard potential, defined.**

Significant hazard potential means a hazard potential classification such that failure or misoperation of the dam would result in no probable loss of human life but could result in major economic loss, environmental damage, or disruption of lifeline facilities.

**Source:** Laws 2005, LB 335, § 32.

**46-1633. Storage elevation, defined.**

Storage elevation means the elevation of the reservoir surface associated with a level of impoundment, such as maximum storage or normal storage.

**Source:** Laws 2005, LB 335, § 33.

**46-1634. Top of dam elevation, defined.**

Top of dam elevation means the maximum design elevation for the top of the dam, including design freeboard allowances but excluding any allowance for settlement due to consolidation of foundation and embankment.

**Source:** Laws 2005, LB 335, § 34.

**46-1635. Purposes of act.**

The purposes of the Safety of Dams and Reservoirs Act are to regulate all dams and associated reservoirs for the protection of public health, safety, and welfare and to minimize the adverse consequences associated with the potential failure of such dams and reservoirs.

**Source:** Laws 2005, LB 335, § 35.

**46-1636. Applicability of other law.**

The Safety of Dams and Reservoirs Act does not relieve the owner or operator of a dam or reservoir from obtaining any necessary approvals from the department under sections 46-233 to 46-241 or from any other local, state, or federal regulatory authority.

**Source:** Laws 2005, LB 335, § 36.

**46-1637. Regulation by political subdivisions; restrictions; conditions.**

(1) Except as provided in subsections (2) and (4) of this section, no city, village, or county may, by ordinance or resolution enacted by the legislative body thereof or adopted by the people, (a) regulate, supervise, or provide for the regulation or supervision of any dams and associated reservoirs or the construction, reconstruction, enlargement, repair, alteration, operation, breach,

removal, or abandonment thereof or (b) limit the size or the impounding capacity of a dam if such action would conflict with the power and authority vested in the department pursuant to the Safety of Dams and Reservoirs Act.

(2) A city, village, or county may adopt ordinances or resolutions (a) regulating, supervising, or providing for the regulation or supervision of dams and reservoirs that are not within the state's jurisdiction and are not subject to regulation, owned, or operated by another public agency or body or (b) which apply only to adjacent structures not germane to the safety of the dam, such as, but not limited to, roads and fences.

(3) A city, village, or county may institute overlay zoning precluding construction of structures downstream of a state-permitted dam that is classified as having other than a high hazard potential if a breach-inundation study performed by an engineer, in accordance with generally accepted engineering practice, determines that construction of such structures would require that such dam be reclassified as having a high hazard potential. The owners of such dam shall provide such engineering study as a condition to requesting such overlay zoning.

(4) The Safety of Dams and Reservoirs Act does not preempt or supersede any local zoning ordinances, resolutions, rules, or regulations regarding special use permits enacted by a political subdivision with respect to permit applications for livestock waste control facilities.

**Source:** Laws 2005, LB 335, § 37.

#### **46-1638. Plans and specifications; responsibility of engineer.**

All plans and specifications for construction, reconstruction, enlargement, alteration, breach, removal, or abandonment of dams and supervision of construction shall be the responsibility of an engineer assisted by qualified engineering geologists and other specialists as necessary.

**Source:** Laws 2005, LB 335, § 38.

#### **46-1639. Immunity from liability; when.**

(1) No action shall be brought against the state, the department, or its agents or employees for the recovery of damages caused by the partial or total failure of any dam by reason of control and regulation thereof pursuant to the Safety of Dams and Reservoirs Act, including, but not limited to, any of the following:

(a) Design and construction application approval of the dam or approval of interim flood routing plans during construction, reconstruction, enlargement, alteration, breach, removal, or abandonment;

(b) The issuance or enforcement of orders relative to maintenance or operation of the dam;

(c) Control and regulation of the dam;

(d) Measures taken to protect against failure of the dam during an emergency, except for negligent acts of the department in assuming control of a dam during an emergency; or

(e) Failure to act.



(2) The Safety of Dams and Reservoirs Act does not relieve an owner or operator of a dam of the legal duties, obligations, or liabilities incident to the ownership or operation of the dam.

**Source:** Laws 2005, LB 335, § 39.

**46-1640. Orders and approval; effect.**

The findings and orders of the department, an application approval, and an approval to operate any dam issued by the department are final, conclusive, and binding upon all owners and state agencies, regulatory or otherwise, as to the safety of design, construction, reconstruction, enlargement, alteration, breach, removal, or abandonment of any dam.

The department may report all dam incidents as defined by the National Performance of Dams Program to the National Performance of Dams Program archive.

**Source:** Laws 2005, LB 335, § 40.

**46-1641. Change of ownership; notification.**

The owner of any dam subject to the Safety of Dams and Reservoirs Act shall notify the department of any change in the ownership of the dam. Notification shall be in such form and include such evidence of ownership as the director may by rule and regulation require.

**Source:** Laws 2005, LB 335, § 41.

**46-1642. Livestock waste control facility; approvals required.**

An applicant for a permit for a livestock waste control facility which includes a dam, holding pond, or lagoon for which approval by the Department of Natural Resources is not otherwise required but for which approval by the Department of Environmental Quality under section 54-2429 is required shall submit an application for approval along with plans, drawings, and specifications to the Department of Natural Resources and obtain approval from the Department of Natural Resources before beginning construction. The Department of Natural Resources shall approve or deny the dam, holding pond, or lagoon pursuant to this section within sixty days after such application is submitted.

**Source:** Laws 2005, LB 335, § 42.

**46-1643. Administrative or judicial recourse; not affected.**

The Safety of Dams and Reservoirs Act does not deprive the owner of any administrative or judicial recourse to the courts to which such owner is entitled under the laws of this state.

**Source:** Laws 2005, LB 335, § 43.

**46-1644. Department; employ personnel.**

The department shall employ an engineer and such individuals otherwise qualified by training and experience in the design, inspection, construction, reconstruction, enlargement, repair, alteration, maintenance, operation, breach, removal, or abandonment of dams as necessary to carry out the Safety of Dams and Reservoirs Act.

**Source:** Laws 2005, LB 335, § 44.

**46-1645. Consulting board required; when; liability for costs.**

When the safety and technical considerations pertaining to an application approval, an approval to operate, or the plans and specifications of a dam require it, or when requested in writing by the owner, the department shall appoint a consulting board of three or more consultants to report to the department on the safety features involved. The cost and expense of a consulting board, if appointed at the request of an owner, shall be paid by the owner.

**Source:** Laws 2005, LB 335, § 45.

**46-1646. Dams; review and approval required; when.**

(1) The department shall review and approve the design, construction, reconstruction, enlargement, alteration, breach, removal, or abandonment of all dams in the state for the protection of life and property as provided in the Safety of Dams and Reservoirs Act.

(2) No person shall construct, reconstruct, enlarge, alter, breach, remove, or abandon any dam without approval by the department.

(3) An owner of a dam who has entered into a cooperative agreement with the department pursuant to subdivision (2)(d) of section [46-1663](#) shall be deemed to be in compliance with the act.

**Source:** Laws 2005, LB 335, § 46.

**46-1647. Potentially hazardous dams; emergency action plans.**

(1) In order to protect life and property, the owner of every high hazard potential dam shall develop and periodically test and update an emergency action plan to be implemented in the event of an emergency involving such dam. In order to protect life and property, the department may require the owners of any significant hazard potential dam to develop and periodically test and update an emergency action plan to be implemented in the event of an emergency involving such dams.

- (2) Such emergency action plan shall include, but not be limited to, the following elements:
- (a) Emergency notification plan with flowchart;
  - (b) A statement of purpose;
  - (c) A project description;
  - (d) Emergency detection, evaluation, and classification;
  - (e) General responsibilities;
  - (f) Preparedness;
  - (g) Inundation maps or other acceptable description of the inundated area; and
  - (h) Appendices.

(3) For purposes of evaluating the adequacy of an emergency action plan, the department shall review, evaluate for adequacy, and approve or disapprove each emergency action plan submitted under this section. The department shall accept emergency action plans developed for dams under a federal dam safety program.

(4) If the department determines that a dam constitutes an immediate risk to life or property, the department shall order the owner to take such action as is necessary to remove such risk.

**Source:** Laws 2005, LB 335, § 47.

**46-1648. Right of entry upon private property; when; immunity.**

In making any investigation or inspection necessary to enforce or implement the Safety of Dams and Reservoirs Act, the department or its representatives, upon reasonable notice, may enter upon private property of the dam and reservoir owner as necessary. Such right of entry shall extend to all employees, surveyors, or other agents of the department in the official performance of their duties, and such persons shall not be liable for prosecution for trespass when performing their official duties.

**Source:** Laws 2005, LB 335, § 48.

**46-1649. Department; investigations and studies.**

(1) The department may investigate and gather or cause the owner to gather such data, including advances made in safety practices elsewhere, as may be needed for a proper review and study of the various features of the design, construction, reconstruction, enlargement, alteration, breach, removal, or abandonment of dams.

(2) The department may make or cause the owner to make such watershed investigations and studies as are necessary to keep abreast of developments affecting runoff and peak storm discharges in the vicinity of a dam.

(3) The department may make or cause the owner to make such seismic investigations and studies as may be necessary to keep abreast of developments affecting seismic stability of a dam.

**Source:** Laws 2005, LB 335, § 49.

**46-1650. Department; enforcement; powers.**

(1) The department may take any administrative or legal action necessary for the enforcement of the Safety of Dams and Reservoirs Act.

(2) An action or proceeding under this section may be initiated whenever any owner or any person acting as an agent of any owner:

(a) Fails to comply with the requirements imposed by the act or by any application approval, approval to operate, order, rule, regulation, or requirement of the department under the act; or

(b) Commits or allows the commission of violations of the act or of any application approval, approval to operate, order, rule, regulation, or requirement of the department under the act.

(3) Any action or proceeding under this section shall be initiated either administratively or in a court in a jurisdiction in which:

(a) The dam, area of hazard potential, or some part thereof exists;

(b) The person named in the complaint has its principal place of business; or

(c) The person named in the complaint resides.

**Source:** Laws 2005, LB 335, § 50.

**46-1651. Rules and regulations.**

(1) The department may adopt and promulgate rules and regulations containing standards for the design, inspection, construction, reconstruction, enlargement, alteration, breach, removal, abandonment, and periodic testing of emergency action plans of dams to carry out the purposes of the Safety of Dams and Reservoirs Act. Such rules and regulations may also include, but are not limited to, establishing:

(a) Standards and criteria for the siting and design of dams, considering both existing and projected conditions which may affect the safety of a project during its construction and operational life;

(b) Requirements for operation of dams, including operational plans to be prepared and implemented by owners;

(c) Requirements for monitoring, inspection, and reporting of conditions affecting the safety of dams; and

(d) Requirements for emergency action plans to be prepared and implemented by owners in cooperation with emergency management authorities.

(2) In adopting rules and regulations applicable to dams which may have a high hazard potential or a significant hazard potential, the department may consider:

- (a) The state of scientific and technological knowledge and good engineering practices relating to various types of dams;
- (b) The economic impact of a failure of a structure upon the state and its citizens; and
- (c) The relationship of dams in hydrologic management in the watershed as a whole.

**Source:** Laws 2005, LB 335, § 51.

**46-1652. Construction or enlargement of dam; application for approval; contents.**

(1) Construction of any new dam or the enlargement of any dam shall not commence until the owner has applied for and obtained from the department written application approval of plans and specifications.

(2) A separate application for each dam shall be filed with the department upon forms provided by the department. Plans and specifications signed and sealed by the design engineer shall accompany the application.

(3) The application shall provide the following information:

- (a) The name and address of the owner;
- (b) The name and address of the applicant, if different from the owner;
- (c) The name and address of the operator or other person to be contacted regarding arrangements for inspections or other matters associated with the dam;
- (d) The location, type, size, purpose, and height of the proposed dam;
- (e) The reservoir surface areas and associated storage capacity at elevation intervals not exceeding two feet;
- (f) Plans for proposed permanent instrument installations in the dam;
- (g) The area of the drainage basin, rainfall records, streamflow records, and flood flow records and estimates, if available;
- (h) Maps and design drawings showing plans, elevations, and sections of all principal structures and appurtenant works with other features of the project in sufficient detail, including design analyses, to determine safety, adequacy, and suitability of design;
- (i) The estimated construction cost of the dam; and
- (j) Such other pertinent information as the department requires.

(4) The department may, when in its judgment it is necessary, also require the following:

- (a) Data concerning subsoil and rock foundation conditions and the materials involved in the construction of the dam;
- (b) Investigations of, and reports on, subsurface conditions, exploratory pits, trenches and adits, drilling, coring, and geophysical tests to measure in place and in the laboratory the properties and behavior of foundation materials at the dam site;
- (c) Investigations and reports on the geology of the dam site, possible geologic hazards, seismic activity, faults, weak seams and joints, availability and quality of construction materials, and other pertinent features; and
- (d) Other appropriate information.

(5) If an application is incomplete or defective, it shall be returned to the applicant to complete or to correct the defects. The application shall be corrected and returned to the department within ninety days after it is returned to the applicant or within such additional time as may be allowed by the department. If the application is returned to the department after expiration of such time period, it shall be dismissed.

**Source:** Laws 2005, LB 335, § 52.

**46-1653. Modifications to existing dam; application for approval; contents; exemption.**

(1) Before commencing the reconstruction or alteration of a dam or the abandonment, breach, or removal of a dam so that it no longer constitutes a dam, the owner shall file an application and secure the written application approval of the department.

(2) The application shall give such pertinent information or data concerning the dam as may be required by the department.

(3) The application shall give the name and address of the applicant and shall adequately detail, with appropriate references to the existing dam, the proposed reconstruction, alteration, abandonment, breach, or removal of the dam. The application shall be accompanied by plans and specifications signed and sealed by the design engineer. The department may waive any of the requirements of this section if the requirements are unnecessary for the application approval.

(4) If an application is incomplete or defective, it shall be returned to the applicant to complete or to correct the defects. The application shall be corrected and returned to the department within ninety days after it is returned to the applicant or within such additional time as may be allowed by the department. If the application is returned to the department after expiration of such time period, it shall be dismissed.

(5) In case of an emergency in which the department declares that repairs or breaching of the dam are necessary to safeguard life and property, repairs or breaching shall be started immediately by the owner or by the department at the owner's expense. The department shall be notified within twenty-four hours of emergency repairs or breaching when instituted by the owner.

(6) The proposed repairs or breaching shall conform to any orders issued by the department.

**Source:** Laws 2005, LB 335, § 53.

**46-1654. Application approval; issuance; public hearing; notice to department; when.**

(1) Approval of applications for which approval under sections 46-233 to 46-242 is not required shall be issued within ninety days after receipt of the completed application plus any extensions of time required to resolve matters diligently pursued by the applicant. At the discretion of the department, one or more public hearings may be held on an application.

(2) Approval of applications under the Safety of Dams and Reservoirs Act, for which approval under sections 46-233 to 46-242 is required, shall not be issued until all pending matters before the department under the Safety of Dams and Reservoirs Act or such sections have been resolved and approved.

(3) Application approval shall be granted with terms, conditions, and limitations necessary to safeguard life and property.

(4) If actual construction, reconstruction, enlargement, alteration, breach, removal, or abandonment of the dam is not commenced within the time established by the department, the application approval becomes void, except that the department may, upon written application and for good cause shown, extend the time for commencing construction, reconstruction, enlargement, alteration, breach, removal, or abandonment. If approval under sections 46-233 to 46-242 is also required, the department may not extend the time for commencing construction without following the procedures and granting a similar extension under subsection (2) of section 46-238.

(5) Written notice shall be provided to the department at least ten days before construction, reconstruction, enlargement, alteration, breach, removal, or abandonment is to begin and such other notices shall be given to the department as it may require.

**Source:** Laws 2005, LB 335, § 54; Laws 2009, LB209, § 2; Laws 2011, LB32, § 1.  
Effective date: August 27, 2011.

#### **46-1655. Fees.**

(1) The application for approval of construction, reconstruction, enlargement, alteration, breach, removal, or abandonment of a dam shall be accompanied by a filing fee as established by rule and regulation of the department but not to exceed (a) two hundred dollars for a dam less than twenty-five feet in height, (b) three hundred dollars for a dam twenty-five feet in height to not more than fifty feet in height, and (c) four hundred dollars for a dam in excess of fifty feet in height.

(2) Only one filing fee shall be collected for an enlargement by flashboards, sandbags, earthen levees, gates, or other works, devices, or obstructions which are from time to time to be removed and replaced or opened and shut and thereby operated so as to vary the surface elevation of the reservoir.

(3) A dam subject to the Safety of Dams and Reservoirs Act and for which plans and specifications have been approved prior to September 4, 2005, shall not be required to pay any additional fee or submit an additional application for approval unless such dam requires reconstruction, enlargement, alteration, breach, removal, or abandonment.

(4) An application shall not be considered by the department until the filing fee is received.

(5) Fees collected by the department under this section shall be remitted to the State Treasurer for credit to the Dam Safety Cash Fund.

**Source:** Laws 2005, LB 335, § 55.

**46-1656. Dam Safety Cash Fund; created; use; investment.**

The Dam Safety Cash Fund is created. The fund shall consist of fees credited pursuant to section 46-1655 and any money specifically appropriated to the fund by the Legislature. Money in the fund shall not be subject to any fiscal-year limitation or provision for lapse of unexpended balance at the end of any fiscal year or biennium. The fund shall be administered by the department. Money in the fund may be expended by the department for costs incurred by the department in the administration of the Safety of Dams and Reservoirs Act. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

**Source:** Laws 2005, LB 335, § 56.

**Cross References**

**Nebraska Capital Expansion Act**, see section 72-1269.

**Nebraska State Funds Investment Act**, see section 72-1260.

**46-1657. New or modified dam; owner; filing requirements; approval to operate; issuance.**

(1) Upon completion of a new or reconstructed dam and reservoir or of the enlargement of a dam and reservoir, the owner shall file with the department a completion certification accompanied by supplementary drawings or descriptive matter signed and sealed by the design engineer, showing or describing the work as actually completed. Such supplementary materials may include, but need not be limited to, the following as determined by the department:

(a) A record of all geological boreholes and grout holes and grouting;

(b) A record of permanent location points, benchmarks, and instruments embedded in the structure;

(c) A record of tests of concrete or other material used in the construction, reconstruction, or enlargement of the dam; and

(d) A record of initial seepage flows and embedded instrument readings.

(2) In connection with the enlargement of a dam, the supplementary drawings and descriptive matter need apply only to the new work.



(3) An approval to operate shall be issued by the department upon a finding by the department that the dam is safe to impound within the limitations prescribed in the application approval. No impoundment by the structure shall occur prior to issuance of the approval to operate.

**Source:** Laws 2005, LB 335, § 57.

**46-1658. Alteration of dam; owner; filing requirements; approval to operate; issuance.**

(1) Upon completion of the alteration of any dam, the owner shall file with the department a completion certification accompanied by supplementary drawings or descriptive matter, as determined by the department, signed and sealed by the design engineer, showing or describing the work as actually completed.

(2) An approval to operate shall be issued upon a finding by the department that the dam is safe to impound within the limitations prescribed in the application approval. Pending issuance of a new or revised approval to operate, the owner of the dam shall not cause the dam to impound beyond the limitations prescribed in the existing application approval.

**Source:** Laws 2005, LB 335, § 58.

**46-1659. Removal, breach, or abandonment of dam; design engineer; duties; department; powers.**

(1) Upon completion of the removal, breach, or abandonment of a dam, the design engineer shall file with the department a completion certification.

(2) Before final approval of the removal of a dam is issued, the department may inspect the site of the work and determine that all work was accomplished in substantial conformance with the application approval.

(3) Following the removal of a dam, the department may report such removal to the National Performance of Dams Program and to the National Inventory of Dams.

**Source:** Laws 2005, LB 335, § 59.

**46-1660. Approval to operate; department; powers; hearing; notice.**

(1) Each approval to operate issued by the department under the Safety of Dams and Reservoirs Act shall contain such terms and conditions as the department may prescribe.

(2) The department shall revoke, suspend, or amend any approval to operate whenever it determines that the dam constitutes a danger to life and property.

(3) Before any approval to operate is revoked by the department, the department shall hold a public hearing. Written notice of the time and place of the hearing shall be mailed to the owner at least thirty days before the date set for the hearing. Any interested persons may appear at the hearing and present their views and objections to the proposed action.

**Source:** Laws 2005, LB 335, § 60.

**46-1661. Complaint; department; duties; unsafe condition; modification.**

(1) Upon receipt of a written complaint alleging that the person or property of the complainant is endangered by the construction, reconstruction, enlargement, alteration, breach, removal, or abandonment of any dam, the department shall cause an inspection and investigation to be made unless the data, records, and inspection reports on file are found adequate to make a determination whether the complaint is valid. The complainant shall be provided with a copy of the official report of the inspection and investigation.

(2) If it is found that an unsafe condition exists, the department shall notify the owner of the dam to take such action as is necessary to correct the condition, including breaching or removal of any dam found to be beyond repair.

**Source:** Laws 2005, LB 335, § 61.

**46-1662. Periodic inspections; when; department; powers and duties.**

(1) During the construction, reconstruction, enlargement, alteration, breach, removal, or abandonment of any dam, the department may make periodic inspections for the purpose of ascertaining compliance with the approved plans and specifications. The department shall require the owner to direct the design engineer to provide adequate supervision during construction, reconstruction, enlargement, alteration, breach, removal, or abandonment and to provide sufficient information to enable the department to determine that conformity with the approved plans and specifications is being attained.

(2) If, after any inspection or investigation, during the construction, reconstruction, enlargement, alteration, breach, removal, or abandonment of a dam or at any time prior to issuance of an approval to operate, it is found by the department that modifications or changes are necessary to ensure the safety of the dam, the department shall order the owner to revise his or her plans and specifications. The owner may, pursuant to section [46-1645](#), request an independent consulting board to review the order of the department.

(3) If at any time during construction, reconstruction, enlargement, alteration, breach, removal, or abandonment of any dam, the department finds that the work is not being done in accordance with the approved plans and specifications, the department shall deliver a written notice of noncompliance to the owner. The notice shall be delivered by registered mail or by personal service to the owner, shall state the particulars in which the approved plans and specifications are not being or have not been complied with, and shall order immediate

compliance with the approved plans and specifications. The department may order that no further work be done until such compliance has been effected and approved by the department.

(4) Failure to comply with the notice delivered under subsection (3) of this section may cause revocation of application approval by the department. If compliance with the notice has not occurred within sixty days after the date of the notice, the department shall order the incomplete structure removed sufficiently to eliminate any safety hazard to life.

**Source:** Laws 2005, LB 335, § 62.

**46-1663. Record-keeping requirements; maintenance, operation, and inspection; department; powers.**

(1) The department shall require owners to keep original records and any modifications to construction available and in good order.

(2) The department may:

(a) Adopt such rules and regulations and issue such orders as necessary to secure adequate maintenance, operation, and inspection by owners;

(b) Require engineering and geologic investigations to safeguard life and property;

(c) Accept approvals and reports of equivalent inspections prepared for dams under a federal dam safety program; and

(d) Enter into cooperative agreements with the owners of dams which are required to comply with a federal dam safety program that has objectives, standards, and requirements that meet or exceed the purposes of the Safety of Dams and Reservoirs Act.

**Source:** Laws 2005, LB 335, § 63.

**46-1664. Safety inspections; when; department; powers and duties.**

(1) The department shall inspect dams for the purpose of determining their safety. The normal inspection frequency shall be annually for high hazard potential dams, biennially for significant hazard potential dams, and every five years for low hazard potential dams and every five years or more for minimal hazard potential dams. The department may vary the inspection frequency of some sites based on an evaluation of the site performance history. The department may conduct additional inspections at any time. If serious safety concerns are found by the department during the inspections, the department shall require the owner to conduct tests and investigations sufficient for the department to determine the condition of the dam. After review of the tests or investigations, the department may require modification, removal, or breach of the dam or alteration of operating procedures to restore or improve the safety of the dam and may require installation of instrumentation to monitor the performance of the dam.

(2) The department may report the results of dam inspections that determine unsafe conditions or noncompliance to the National Performance of Dams Program.

**Source:** Laws 2005, LB 335, § 64.

**46-1665. Emergency actions involving a dam; owner; duties; department; duties.**

(1) The owner of a dam has the primary responsibility for determining when an emergency exists. When the owner of a dam determines that an emergency exists involving a dam, the owner shall immediately implement the emergency action plan as required pursuant to section 46-1647. The owner shall immediately notify any persons who may be endangered if the dam should fail, notify emergency management organizations in the area, take necessary remedial action to prevent or mitigate the consequences of failure, and notify the department. The department shall take any remedial action necessary to protect life and property if, in its judgment, either:

(a) The condition of any dam is so dangerous to the safety of life or property as not to permit time for the issuance and enforcement of an order relative to maintenance or operation; or

(b) Passing or imminent floods or any other condition threatens the safety of any dam.

(2) In applying the remedial means provided for in this section, the department may in an emergency, with its own forces or by other means at its disposal, do any or all of the following:

(a) Take full charge and control of any dam;

(b) Lower the water level by releasing water from the reservoir;

(c) Completely drain the reservoir;

(d) Perform any necessary remedial or protective work at the site; or

(e) Take such other steps as may be essential to safeguard life and property.

(3) The department shall continue in full charge and control of such dam and its appurtenant works until they are rendered safe or the emergency occasioning the action has ceased and the owner is able to take back full charge and control. The department's taking full charge and control under this section does not relieve the owner of such dam of liability for any negligent acts of such owner.

(4) The department may report emergency actions involving the safety of a dam to the National Performance of Dams Program in a timely manner.

**Source:** Laws 2005, LB 335, § 65.

**46-1666. Violations; penalties.**

(1) Violation of the Safety of Dams and Reservoirs Act or of any application approval, approval to operate, order, rule, regulation, or requirement of the department under the act is a Class V misdemeanor. Each day that the violation continues constitutes a separate and distinct offense.

(2) Any person who willfully obstructs, hinders, or prevents the department from performing the duties imposed by the act commits a Class IV misdemeanor.

(3) Any owner or any person who engages in the construction, reconstruction, enlargement, alteration, breach, removal, or abandonment of any dam or who knowingly does work on or permits work to be done on the dam without the approval of the department or in violation of the act and who fails to immediately notify the department thereof commits a Class V misdemeanor.

**Source:** Laws 2005, LB 335, § 66.

**46-1667. Notice of violation; orders; procedure.**

(1) If the department has reason to believe that an owner or other person is violating or has violated the Safety of Dams and Reservoirs Act, an application approval, an approval to operate, a rule, a regulation, an order, or a requirement of the department issued or adopted pursuant to the act, the department shall give the owner or person written notice by certified mail that the owner or person appears to be in violation of the act. The owner or other person shall have thirty days from the mailing of such notice to respond or to request a hearing before the department as to why the owner or other person should not be ordered to cease and desist from the violation. The notice shall inform the owner or other person how to request the hearing and the consequences of failure to request a hearing.

(2) If the department finds that an owner or person is constructing, reconstructing, enlarging, altering, breaching, removing, or abandoning a dam without having first obtained the required application approval, the department shall issue a temporary order for the owner or person to cease and desist the construction, reconstruction, enlargement, alteration, breach, removal, or abandonment pending final action by the department pursuant to subsection (3) of this section. The temporary order shall include written notice by certified mail to the owner or person of the time and date set by the department for a hearing to show cause why the temporary order should be vacated.

(3) After a response to a notice or a hearing pursuant to subsection (1) or (2) of this section or after the expiration of time to request a hearing, the department shall issue a decision and final order. The decision and final order may take such form as the department determines to be reasonable and appropriate and may include a determination of violation, a cease and desist order, the recommendation of a civil penalty, and an order directing that positive steps be taken to abate or ameliorate any harm or damage arising from the violation. The owner or person affected may appeal the hearing decision as provided in section 61-207.

(4) If the owner or person continues the violation after the department has issued a final decision and order pursuant to subsection (3) of this section or a temporary order pursuant to subsection (2) of this section, the department may apply for a temporary restraining order or preliminary or permanent injunction from a court of competent jurisdiction. A decision to seek injunctive relief does not preclude other forms of relief or enforcement against the violator.

**Source:** Laws 2005, LB 335, § 67.

**46-1668. Violations; civil penalty.**

(1) Any person who violates the Safety of Dams and Reservoirs Act or an application approval, an approval to operate, a rule, a regulation, an order, or a requirement of the department under the act may be assessed a civil penalty in an amount not to exceed five hundred dollars per day for each day the violation continues.

(2) The department shall bring an action to recover a penalty imposed under this section in a court in the jurisdiction in which the violation occurred.

(3) In determining the amount of the penalty, the court shall consider the degree of harm to the public, whether the violation was knowing or willful, the past conduct of the defendant, whether the defendant has taken steps to cease, remove, or mitigate the violation, and any other relevant information.

**Source:** Laws 2005, LB 335, § 68.

**46-1669. Appeal.**

Any affected person aggrieved by any final order or decision made by the director pursuant to the Safety of Dams and Reservoirs Act may appeal the order as provided in section [61-207](#). For purposes of this section, affected person means the applicant or holder of any approvals under the act and any owner of an estate or interest in or concerning land or water whose interest is or may be impacted in a direct and significant manner by such final order or decision.

**Source:** Laws 2005, LB 335, § 69.

**46-1670. Existing unapproved dams; requirements.**

(1) Every owner of a dam subject to the Safety of Dams and Reservoirs Act that was completed prior to September 4, 2005, and not previously approved by the department when departmental approval was otherwise required shall file an application with the department for approval of such dam.

(2) A separate application for each dam shall be filed with the department upon forms supplied by the department and shall include such appropriate information concerning the dam as the department requires.

(3) The department may give notice, by certified mail to the owner's last address of record in the office of the county assessor of the county in which the dam is located, to the owner of dams required under this section to file an application who or which have failed to do so, and a failure to file within sixty days after receipt of such notice shall be punishable as provided in the act.

(4) The department may make inspections of such dams and may require owners of such dams and reservoirs to perform, at the owner's expense, such work or tests as may reasonably be required to disclose information sufficient to enable the department to determine whether to issue an approval to operate or to issue orders directing further work at the owner's expense necessary to safeguard life and property. For this purpose, the department may require an owner to lower the water level of or to drain the reservoir.

(5) If, upon inspection or upon completion to the satisfaction of the department of all work ordered, the department finds that the dam is safe to impound, an approval to operate shall be issued.

(6) If at any time the department finds that the dam is not safe to impound, the department shall notify the owner in writing and shall set a time and place for hearing on the matter. The owner of such dam shall ensure that such dam does not impound following receipt of such notice. Written notice of the time and place of the hearing shall be mailed, at least thirty days prior to the date set for the hearing, to the owner. Any interested person may appear at the hearing and present his or her views and objections to the proposed action.

**Source:** Laws 2005, LB 335, § 70.

## CHAPTER 54

### ARTICLE 24

#### LIVESTOCK WASTE MANAGEMENT ACT

**54-2429. National Pollutant Discharge Elimination System permit; construction and operating permit; application; approval from Department of Natural Resources; Department of Environmental Quality; powers; applicability of Engineers and Architects Regulation Act.**

(1) An applicant for a National Pollutant Discharge Elimination System permit or a construction and operating permit under the Environmental Protection Act or the Livestock Waste Management Act shall, before issuance by the Department of Environmental Quality, obtain any necessary approvals from the Department of Natural Resources under the Safety of Dams and Reservoirs Act and certify such approvals to the Department of Environmental Quality. The Department of Environmental Quality, with the concurrence of the Department of Natural Resources, may require the applicant to obtain approval from the Department of Natural Resources for any dam, holding pond, or lagoon structure which would not otherwise require approval under the Safety of Dams and Reservoirs Act but which in the event of a failure could result in a significant discharge into waters of the state and have a significant impact on the environment. The Department of Environmental Quality may provide for the payment of such costs of the Department of Natural Resources with revenue generated under section 54-2428.

(2) An applicant required to obtain a National Pollutant Discharge Elimination System permit is subject to the requirements of the Engineers and Architects Regulation Act.

(3) An applicant who has a large concentrated animal feeding operation, as defined in 40 C.F.R. 122 and 123, as such regulations existed on January 1, 2004, and who is required to obtain a construction and operating permit is subject to the requirements of the Engineers and Architects Regulation Act.

(4) An applicant who has a small or medium animal feeding operation, as defined in 40 C.F.R. 122 and 123, as such regulations existed on January 1, 2004, and who is required to obtain a construction and operating permit, but not required to obtain a National Pollutant Discharge Elimination System permit, is exempt from the Engineers and Architects Regulation Act.

(5) The department may require an engineering evaluation or assessment performed by a licensed professional engineer for a livestock waste control facility if after an inspection: (a) The department determines that the facility has (i) visible signs of structural breakage below the permanent pool, (ii) signs of discharge or proven discharge due to structural weakness, (iii) improper maintenance, or (iv) inadequate capacity; or (b) the department has reason to believe that an animal feeding operation with a livestock waste control facility has violated or



threatens to violate the Environmental Protection Act, the Livestock Waste Management Act, or any rules or regulations adopted and promulgated under such acts. Animal feeding operations not required to have a permit under the Environmental Protection Act, the Livestock Waste Management Act, or the rules and regulations adopted and promulgated pursuant to such acts are exempt from the Engineers and Architects Regulation Act.

**Source:** Laws 1998, LB 1209, § 12; Laws 1999, LB 870, § 13; Laws 2000, LB 900, § 243; Laws 2003, LB 619, § 16; R.S.Supp.,2003, § 54-2412; Laws 2004, LB 916, § 18; Laws 2005, LB 335, § 80; Laws 2006, LB 975, § 11; Laws 2007, LB313, § 1.

### **Cross References**

**Engineers and Architects Regulation Act**, see section 81-3401.

**Environmental Protection Act**, see section 81-1532.

**Safety of Dams and Reservoirs Act**, see section 46-1601.

### **54-2430. Surface water runoff; diversion requirements; increase in acreage limitation; conditions.**

(1) Except as provided in this section, no new livestock waste control facility shall be constructed and no physical onsite activities specific to a new livestock waste control facility, except the use of a borrow site for construction of other components of the animal feeding operation, shall be initiated unless surface water runoff from the upstream area, except incidental runoff, is adequately diverted around the structure and is not permitted to enter the reservoir area. For purposes of this section, incidental runoff means the runoff that drains from the slope of the embankments, the top of the dam, the reservoir area, the feedlots, the associated roadways, and up to twenty-five acres of additional area that cannot be diverted. Incidental runoff capacity from a twenty-five-year frequency, twenty-four-hour storm shall be provided for in the waste reservoir in addition to the capacity required for the waste effluent or stored materials.

(2) The Department of Natural Resources shall permit a requested increase in the twenty-five-acre limitation for a new livestock waste control facility for an animal feeding operation for which an inspection was requested prior to January 1, 2000, unless the department determines that the detriment to existing water users that would result from permitting the acreage increase would outweigh the detriment to the operator of the animal feeding operation if the increase were not permitted.

(3) For other new livestock waste control facilities, the Department of Natural Resources may permit an increase in the twenty-five-acre limitation if it determines that (a) the applicant has no reasonable way to limit the amount of the additional runoff acreage to twenty-five acres or less at the proposed location of the livestock waste control facility, (b) the applicant has no reasonable alternative for relocating the livestock waste control facility so that the additional runoff acreage would not exceed twenty-five acres, and (c) either (i) an increase in the permitted runoff acreage would not reduce water supplies to the detriment of existing water users or (ii)(A) the requested facility is for a proposed expansion of an animal feeding operation in existence and

in compliance with the Livestock Waste Management Act as of January 1, 2003, (B) the amount of the runoff acreage permitted in excess of the twenty-five-acre limitation is not more than fifteen percent of total permitted feedlot area, and (C) any detriment to existing water users that would result from permitting the acreage increase would be outweighed by the detriment to the operator of the animal feeding operation if the increase were not permitted.

**Source:** Laws 2003, LB 619, § 17; R.S.Supp.,2003, § 54-2415; Laws 2004, LB 916, § 19.

## **CHAPTER 2**

### **ARTICLE 32**

#### **NATURAL RESOURCES DISTRICTS**

##### **2-3257. Structural works; design; submit to department; approve or disapprove.**

Detailed plans for the design of certain structural works by a district shall be submitted to the department as outlined in the Safety of Dams and Reservoirs Act and section 46-256. The department shall review the plans and shall approve or disapprove such plans within thirty days after submission. No construction work shall be started until the department has approved such plans.

**Source:** Laws 1969, c. 9, § 57, p. 133; Laws 2000, LB 900, § 59; Laws 2005, LB 335, § 71.

##### **Cross Reference**

**Safety of Dams and Reservoirs Act**, see section 46-1601.

## CHAPTER 37

### ARTICLE 8

#### NONGAME AND ENDANGERED SPECIES ACT

**37-807. Commission; establish conservation programs; agreements authorized; Governor and state agencies; duties; public meeting; when required.**

(1) The commission shall establish such programs, including acquisition of land or aquatic habitat or interests therein, as are necessary for the conservation of nongame, threatened, or endangered species of wildlife or wild plants. Acquisition for the purposes of this subsection shall not include the power to obtain by eminent domain.

(2) In carrying out programs authorized by this section, the commission shall consult with other states having a common interest in particular species of nongame, endangered, or threatened species of wildlife or wild plants and may enter into agreements with federal agencies, other states, political subdivisions of this state, or private persons with respect to programs designed to conserve such species including, when appropriate, agreements for administration and management of any area established under this section or utilized for conservation of such species.

(3) The Governor shall review other programs administered by him or her and utilize such programs in furtherance of the purposes of the Nongame and Endangered Species Conservation Act. All other state agencies shall, in consultation with and with the assistance of the commission, utilize their authorities in furtherance of the purposes of the act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 37-806 and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the commission to be critical. For purposes of this subsection, state agency means any department, agency, board, bureau, or commission of the state or any corporation whose primary function is to act as, and while acting as, an instrumentality or agency of the state, except that state agency shall not include a natural resources district or any other political subdivision.

(4) The commission shall provide notice and hold a public meeting prior to the implementation of conservation programs designed to reestablish threatened, endangered, or extirpated species of wildlife or wild plants through the release of animals or plants to the wild. The purpose of holding such a public meeting shall be to inform the public of programs requiring the release to the wild of such wildlife or wild plants and to solicit public input and opinion. The commission shall set a date and time for the public meeting to be held at a site convenient to the proposed release area and shall publish a notice of such meeting in a legal newspaper published in or of general circulation in the county or counties where the proposed release is to take place. The notice shall be published at least twenty days prior to the meeting and shall set forth the purpose, date, time, and place of the meeting.

**Source:** Laws 1975, LB 145, § 6; Laws 1984, LB 1106, § 22; Laws 1987, LB 150, § 3; Laws 1991, LB 772, § 3; R.S.1943, (1993), § 37-435; Laws 1998, LB 922, § 357.

As the Department of Water Resources is a state agency within the meaning of the Nongame and Endangered Species Act, the issuance of a permit through its director would qualify as an "action" taken by a state agency. Therefore, the director may not issue permits which would jeopardize the continued existence of an endangered or threatened species, or result in the destruction or modification of their habitat. *Central Platte NRD v. City of Fremont*, 250 Neb. 252, 549 N.W.2d 112 (1996).

Before authorizing a diversion project, the Department of Water Resources must consult with the Game and Parks Commission and must obtain an opinion as to whether the project will jeopardize threatened or endangered species. However, the opinion, merely by being issued, does not impose affirmative requirements upon an application. *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994).

If the director of the state Department of Water Resources, pursuant to subsection (3) of this section,

considers and relies on the opinion of the state Game and Parks Commission in making his or her decision about diversion of unappropriated waters, the applicant is affected by the statute and thus is entitled to challenge its constitutionality. This section does not violate the provisions of Article XV, sections 4, 5, and 6, of the Constitution of Nebraska. *In re Applications A-10627 et al.*, 243 Neb. 419, 499 N.W.2d 548 (1993).

This section places two separate and distinct duties upon state departments and agencies, that of consultation with the Game and Parks Commission and, once done, an independent duty to insure that the actions they take or authorize do not jeopardize the continued existence of an endangered species or its habitat. Both the Department of Water Resources and the various natural resources districts are state departments or agencies within the meaning of this act. *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 210 Neb. 862, 317 N.W.2d 726 (1982).

## CHAPTER 56

### ARTICLE 1

#### MILLDAMS

##### **56-101. Dams and sites; acquisition; eminent domain; procedure.**

The power of eminent domain may be exercised by (1) any person who desires to erect a dam across any watercourse for the purpose of building a water grist, saw, carding, or fulling mill or of erecting any machinery to be propelled by water and who is the owner of the lands, on which he or she desires to build such mill or erect such machinery, on one side of such watercourse and not of the lands of the opposite side against or upon which he or she would abut the dam; (2) any person who is the owner of the lands on which he or she desires to erect any such mill or machinery on both sides of such watercourse; or (3) any person who erected such mill and milldam on his or her own lands. Any such person shall first obtain a permit from the Department of Natural Resources to use the waters of such watercourse for such purposes. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724.

**Source:** G.S.1873, c. 44, § 1, p. 472; Laws 1911, c. 82, § 1, p. 336; R.S.1913, § 3974; C.S.1922, § 3377; C.S.1929, § 56-101; R.S.1943, § 56-101; Laws 1951, c. 101, § 101, p. 494; Laws 2000, LB 900, § 244.

#### Cross References

**Eminent domain**, other provisions conferring power of, see sections 46-246 and 46-247.

**Water use applications to Department of Natural Resources**, see sections 46-233 to 46-243.

##### **1. Acquisition of rights**

Parol license to enter land and construct dam or ditches is irrevocable after licensee has acted upon it by expenditure of money and labor, and used it for years without objection. *Arterburn v. Beard*, 86 Neb. 733, 126 N.W. 379 (1910).

Miller may acquire right of flowage by uninterrupted, continuous, and adverse possession and user. *Gross v. Jones*, 85 Neb. 77, 122 N.W. 681 (1909).

Right of flowage acquired becomes appurtenant to mill. *Johnson v. Sherman County Irr., Water-Power & Improvement Co.*, 63 Neb. 510, 88 N.W. 676 (1902).

Millowner cannot raise dam so as to back water against milldam above him. *Stumbo v. Seeley*, 23 Neb. 212, 36 N.W. 487 (1888).

##### **2. Easement**

Mill race, dam, and water are easements, and pass as appurtenances to mill property under sheriff's deed in foreclosure. *Johnson v. Sherman County Irr., Water-Power & Improvement Co.*, 71 Neb. 452, 98 N.W. 1096 (1904).

Mill race and dam are easements of school lands and sale of mill upon adjacent land carries these easements as appurtenances. *Hoover v. Hale*, 56 Neb. 67, 76 N.W. 457 (1898).

##### **3. Abandonment of rights**

Rights acquired under this section are not granted in perpetuity, but may be lost by abandonment or nonuser. *Gross v. Jones*, 85 Neb. 77, 122 N.W. 681 (1909).

##### **4. Procedure to assess damages**

Proceeding may be instituted by either the erector of dam or landowner to assess the damages, and when brought, it is carried on

as an ordinary action, including right to dismiss without prejudice. *Blue River Power Co. v. Hronik*, 116 Neb. 405, 217 N.W. 604 (1928).

##### **5. Injunction**

Injunction should issue only temporarily against owner of mill site until, by proper proceedings, right can be acquired to build dam. *Gross v. Jones*, 85 Neb. 77, 122 N.W. 681 (1909).

Owner of mill and dam, who lowers water in such manner as to injure or destroy ice privileges of owner of land bordering on pond, is liable in damages but injunction will not be granted. *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 60 N.W. 717 (1894).

Where ad quod damnum proceedings are comprised by owner leasing part of land, lessee acquired vested right in stream and water, and lessor may be enjoined from interfering. *Culver v. Garbe*, 27 Neb. 312, 43 N.W. 237 (1889).

After a party has erected a mill and is operating same, landowner cannot maintain action to enjoin where proceedings to assess damages are pending. *Nosser v. Seeley*, 10 Neb. 460, 6 N.W. 755 (1880).

##### **6. Miscellaneous**

On application by riparian owner solely to procure record of prior appropriation of water, Department of Roads and Irrigation was not authorized to fix height of dam that applicant may erect. *Black Bros. Flour Mills v. Umphenour*, 111 Neb. 218, 196 N.W. 123 (1923).

Common-law rules in force except as modified by statute. *Slattery v. Harley*, 58 Neb. 575, 79 N.W. 151 (1899).

Object of this act is to utilize water power of state, not create monopolies, and should be reasonably construed. *Seeley v. Bridges*, 13 Neb. 547, 14 N.W. 524 (1882).

## VI. Classification of Penalties

### 28-106. Misdemeanors; classification of penalties; sentences; where served.

(1) For purposes of the Nebraska Criminal Code and any statute passed by the Legislature after the date of passage of the code, misdemeanors are divided into seven classes which are distinguished from one another by the following penalties which are authorized upon conviction:

Class I misdemeanor.....	Maximum — not more than one year imprisonment, or one thousand dollars fine, or both Minimum — none
Class II misdemeanor.....	Maximum — six months imprisonment, or one thousand dollars fine, or both Minimum — none
Class III misdemeanor.....	Maximum — three months imprisonment, or five hundred dollars fine, or both Minimum — none
Class IIIA misdemeanor.....	Maximum — seven days imprisonment, five hundred dollars fine, or both Minimum — none
Class IV misdemeanor.....	Maximum — no imprisonment, five hundred dollars fine Minimum — one hundred dollars fine
Class V misdemeanor.....	Maximum — no imprisonment, one hundred dollars fine Minimum — none
Class W misdemeanor.....	Driving under the influence or implied consent First conviction Maximum — sixty days imprisonment and five hundred dollars fine Mandatory minimum — seven days imprisonment and five hundred dollars fine Second conviction Maximum — six months imprisonment and five hundred dollars fine Mandatory minimum — thirty days imprisonment and five hundred dollars fine Third conviction Maximum — one year imprisonment and one thousand dollars fine Mandatory minimum — ninety days imprisonment and one thousand dollars fine

(2) Sentences of imprisonment in misdemeanor cases shall be served in the county jail, except that in the following circumstances the court may, in its discretion, order that such sentences be served in institutions under the jurisdiction of the Department of Correctional Services:

(a) If the sentence is for a term of one year upon conviction of a Class I misdemeanor;

(b) If the sentence is to be served concurrently or consecutively with a term for conviction of a felony; or

(c) If the Department of Correctional Services has certified as provided in section 28-105 as to the availability of facilities and programs for short-term prisoners and the sentence is for a term of six months or more.

**Source:** Laws 1977, LB 38, § 6; Laws 1982, LB 568, § 1; Laws 1986, LB 153, § 1; Laws 1992, LB 291, § 1; Laws 1998, LB 309, § 1; Laws 2002, LB 82, § 3; Laws 2005, LB 594, § 1; Laws 2011, LB675, § 1.

**Operative date January 1, 2012.**

The proper determination of punishment for fourth offense driving under the influence of an alcoholic liquor or drug is governed by subsection (1) of this section and not by section 28-107(3). *State v. Schultz*, 252 Neb. 746, 566 N.W.2d 739 (1997).

For a Class III misdemeanor, a sentence of five days in jail with a fine of three hundred dollars is within the statutory maximum and will not be disturbed on appeal absent an abuse of discretion. *State v. Rosenberry*, 209 Neb. 383, 307 N.W.2d 823 (1981).