

No. 1979-70

AN ACT

SB 181

Amending the act of November 26, 1978 (P.L.1375, No.325), entitled "An act providing for the regulation and safety of dams and reservoirs; consolidating and clarifying the programs of the Department of Environmental Resources and Navigation Commission for the Delaware River; establishing penalties and repealing certain acts," further providing for water obstructions and encroachments and changing a repeal.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The title and sections 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 17, 18, 19, 23, 25, 26 and 27, act of November 26, 1978 (P.L.1375, No.325) known as the "Dam Safety Act," are amended to read:

AN ACT

Providing for the regulation and safety of dams and reservoirs, *water obstructions and encroachments*; consolidating and clarifying the programs of the Department of Environmental Resources and Navigation Commission for the Delaware River; establishing penalties and repealing certain acts.

Section 1. Short title.

This act shall be known and may be cited as the "Dam Safety *and Encroachments Act*."

Section 2. Purposes.

The purposes of this act are to:

(1) Provide for the regulation of dams and reservoirs, *water obstructions and encroachments* in the Commonwealth, in order to protect the health, safety and welfare of the people and property.

(2) Assure proper planning, design, construction, maintenance, monitoring and supervision of dams and reservoirs, including such preventative measures as are necessary to provide an adequate margin of safety.

(3) Protect the natural resources, environmental rights and values secured by the Pennsylvania Constitution and conserve the water quality, natural regime and carrying capacity of watercourses.

(4) *Assure proper planning, design, construction, maintenance and monitoring of water obstructions and encroachments, in order to prevent unreasonable interference with waterflow and to protect navigation.*

Section 3. Definitions.

The following words and phrases when used in this act shall have, unless

the context clearly indicates otherwise, the meanings given to them in this section:

“Appurtenant works.” Include, but are not limited to, such structures as spillways, either in the dam or separate therefrom; low level outlet works; and conduits such as tunnels, pipelines or penstocks through the dam or its abutments.

“Body of water.” Any natural or artificial lake, pond, reservoir, swamp, marsh or wetland.

“Construct.” To erect, build, place or deposit, including preliminary preparation of a site for construction.

“Dam.” Any artificial barrier, together with its appurtenant works, constructed for the purpose of impounding or storing water or any other fluid or semifluid; or any refuse bank fill or structure for highway, railroad or other purposes which does or may impound water or any other fluid or semifluid.

“Department.” The Department of Environmental Resources of the Commonwealth of Pennsylvania.

“*Encroachment.*” *Any structure or activity which in any manner changes, expands or diminishes the course, current or cross-section of any watercourse, floodway or body of water.*

“Hearing board.” The Environmental Hearing Board.

“Navigation Commission.” The Navigation Commission for the Delaware River or its navigable tributaries.

“*Operation.*” *Elements of the use, control and functioning of a facility which may affect primarily the storage, release or flow of water, the structural safety of a facility or navigation, with due consideration of the other purposes of this act.*

“Owner.” Any person who owns, controls, operates, maintains, or manages a dam or reservoir, *water obstruction or encroachment.*

“Person.” Includes any natural person, partnership, association, corporation, municipality, municipal authority, receiver or trustee and any department, board, commission or authority of the Commonwealth. Whenever used in a section prescribing and imposing a penalty or sanction, the term “person” shall include the members of an association and the officers of a corporation, municipality or municipal authority.

“Reservoir.” Any basin which contains or will contain the water or other fluid or semifluid impounded by a dam.

“Safety.” Security from the risk or threat of significant loss or injury to life, health, property and the environment.

“*Water obstruction.*” *Includes any dike, bridge, culvert, wall, wing wall, fill, pier, wharf, embankment, abutment or other structure located in, along, across or projecting into any watercourse, floodway or body of water.*

“Watercourse” or “stream.” Any channel of conveyance of surface water having a defined bed and banks, whether natural or artificial, with perennial or intermittent flow.

Section 4. Scope.

This act shall apply to:

(1) All dams on a natural or artificial watercourse, other than those licensed pursuant to the Federal Power Act, where:

(i) the contributory drainage area exceeds 100 acres; or

(ii) the greatest depth of water at maximum storage elevation exceeds 15 feet; or

(iii) the impounding capacity at maximum storage elevation exceeds 50 acre-feet.

(2) All dams used for the storage of water not located on a watercourse and which have no contributory drainage, where the greatest depth of water at maximum storage elevation exceeds 15 feet and the impounding capacity at maximum storage elevation exceeds 50 acre-feet.

(3) All dams used for the storage of fluids or semifluids other than water, the escape of which may result in air, water or land pollution, or may result in danger to persons or property.

(4) All water obstructions and encroachments other than dams, located in, along, across or projecting into any watercourse, floodway or body of water, whether temporary or permanent.

Section 5. Regulations and standards.

(a) The Environmental Quality Board shall have the power, and its duty shall be, to adopt such regulations and standards for the design, construction, operation, monitoring, maintenance, modification, repair and removal of dams and reservoirs, **water obstructions and encroachments** as are necessary and proper to carry out the purposes of this act. The regulations shall include, but are not limited to, rules establishing:

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

(2) Requirements for operation of dams including operational plans to be prepared and implemented by owners.

(3) Requirements for monitoring, **[including the installation of a flood monitoring system of the sensor type in all earthen dams which could cause loss of life or serious damage to property should a failure of the dam occur,]** inspection and reporting of conditions affecting the safety of dams, **water obstructions and encroachments**.

(4) Requirements for emergency warning and action plans to be prepared and implemented by owners, in cooperation with civil authorities.

(5) Reasonable fees for the processing of applications and periodic inspections, for the purpose of reimbursing the Commonwealth for the costs of administration of this act.

(b) In promulgating regulations pursuant to this act **applicable to dams, and to water obstructions and encroachments which may present a**

substantial potential risk to life or property, the Environmental Quality Board shall consider:

(1) the inclusion of the best available preventative measures necessary to assure protection of life, health, property and the environment with an adequate margin of safety;

(2) water management and the impacts of development in watersheds as a whole;

(3) the state of scientific and technological knowledge at the time the regulations are adopted; and

(4) the immediate and long-range economic impact upon the Commonwealth and its citizens.

(c) In promulgating regulations pursuant to this act applicable to water obstructions and encroachments which do not present substantial potential risks to life or property, the Environmental Quality Board shall consider:

(1) the state of scientific and technological knowledge and good engineering practice relating to various types of water obstructions and encroachments;

(2) the economic impact upon the Commonwealth and its citizens;

(3) the relationship of water obstructions and encroachments to hydrologic management in the watershed as a whole; and

(4) the impacts of water obstructions and encroachments upon water quality and the environment.

Section 6. Permit requirement.

(a) No person shall construct, operate, maintain, modify, enlarge or abandon any dam, **water obstruction or encroachment** without the prior written permit of the department.

(b) Any existing dam, **water obstruction or encroachment** constructed pursuant to a license or permit issued in compliance with the provisions of the act of June 8, 1907 (P.L.496, No.322), entitled "An act to establish a Board of Commissioners of Navigation for the river Delaware and its navigable tributaries; regulating their jurisdiction over ships, vessels; and boats, and wharves, piers, bulkheads, docks, slips and basins; and exempting cities of the first class from certain of its provisions; and making an appropriation therefor," or the act of June 25, 1913 (P.L.555, No.355), entitled "An act providing for the regulation of dams, or other structures or obstructions, as defined herein, in, along, across, or projecting into all streams and bodies of water wholly or partly within, or forming part of the boundary of, this Commonwealth; vesting certain powers and duties in the Water Supply Commission of Pennsylvania, for this purpose; and providing penalties for the violation of the provisions hereof," shall be deemed to comply with the construction and operating permit requirements of this section. All such projects shall hereafter comply with the operating, maintenance, monitoring and other requirements of this act.

(c) The owner of any existing dam, **water obstruction or encroachment** who does not hold a permit issued pursuant to the act of June 8, 1907

(P.L.496, No.322), or the act of June 25, 1913 (P.L.555, No.355) shall apply for and receive a permit pursuant to this act on or before January 1, 1981. After the effective date of this act, all such projects shall comply with the operating, maintenance, monitoring and other requirements of this act.

(d) Any permit issued by the department after the effective date of this act for the construction and operation of a water obstruction or encroachment shall incorporate authorization for normal repairs and maintenance of permitted structures conducted within the original specifications for the water obstruction or encroachment. Any repairs or maintenance involving modification of the water obstruction or encroachment from its original specifications and any repairs or reconstruction involving a substantial portion of the structure, shall require the prior written permit of the department pursuant to subsection (a).

Section 7. General permits and waiver of permit requirements.

(a) The Environmental Quality Board may, by regulation, waive the permit requirements [of section 6] for any category of dam, **water obstruction or encroachment** which it determines has insignificant effect upon the safety and protection of life, health, property and the environment.

(b) The department may, in accordance with rules adopted by the Environmental Quality Board, issue general permits on a regional or Statewide basis for any category of dam, **water obstruction or encroachment** if the department determines that the projects in such category are similar in nature, and can be adequately regulated utilizing standardized specifications and conditions.

(c) General permits shall specify such design, operating and monitoring conditions as are necessary to adequately protect life, health, property and the environment, under which such projects may be constructed and maintained without applying for and obtaining individual permits. The department may require the registration of any project constructed pursuant to a general permit.

(d) All general permits shall be published in the Pennsylvania Bulletin at least 30 days prior to the effective date of the permit.

Section 10. Qualifications of persons responsible for design and supervision of projects.

[Where it deems necessary to assure the safe and proper design, construction, operation, monitoring and maintenance of a category of dam, the] The Environmental Quality Board [shall] may establish by regulation the minimum professional, education and experience qualifications of persons responsible for the preparation of plans, design analyses and specifications and the supervision of construction, operation, inspection and monitoring activities, **in order to assure the proper design, construction, operation, monitoring or maintenance of any category of dam or, where necessary to protect public health and safety, of any category of water obstruction or encroachment.**

Section 11. Proof of financial responsibility.

(a) As a requirement for approval of a permit under this act for any category of dam, **water obstruction or encroachment** which may present a substantial potential risk to life or property, the Environmental Quality Board may, by regulation, authorize the department to require proof of financial responsibility or security assuring the proper construction, operation, maintenance and termination of such projects.

(b) As proof of such responsibility or security, the regulations may require one or more of the following:

(1) a Certificate of Public Convenience from the Public Utility Commission if the owner of the proposed facility is subject to regulation under the act of May 28, 1937 (P.L. 1053, No. 286), known as the "Public Utility Law";

(2) ownership or management of the facility by an agency of the Federal, interstate, State, county or municipal government; or

(3) a bond or other legal device of a form acceptable to the department, payable to the Commonwealth, which guarantees proper construction, repair, operation and maintenance, inspections and monitoring of the facility and removal, if necessary. The amount of such shall be sufficient to cover all costs of entry, correction, repair, operation, maintenance, inspection, monitoring or removal of the facility by the Commonwealth in the event of failure of the owner to comply with the provisions of this act, or any regulation, permit or order issued hereunder.

Section 12. Projects affecting navigable waters of the Delaware Basin.

(a) No individual or general permit for a dam, **water obstruction or encroachment** in the commercially navigable waters of the Delaware River or of its navigable tributaries shall be issued without notice to and approval by the Navigation Commission. Any individual permit application or general permit not acted upon by the Navigation Commission within 60 days following notice to the commission, or within 60 days following receipt of any additional information required by the commission, shall be deemed approved by the Navigation Commission.

(b) A record of all permits issued for facilities in the commercially navigable waters of the Delaware River or of its navigable tributaries shall be filed with the Navigation Commission.

(c) The department and Navigation Commission shall cooperate for the purpose of assuring safe navigation in the Delaware River and eliminating any duplication of functions.

Section 13. Duties of owners.

The owner of any dam, **water obstruction or encroachment** shall have the legal duty to:

(1) monitor, operate and maintain the facility in a safe condition in accordance with the regulations, terms and conditions of permits, approved operating plans and orders of the department issued pursuant to this act;

(2) conduct periodic inspections and analyses, as reasonably required by the department considering the type of facility and degree of potential hazard, and *as required* submit certified reports regarding the condition of the facility to the department: ***Provided, That in lieu of certified reports from the owner, the department may accept reports of equivalent inspections prepared by governmental agencies;***

(3) immediately notify the department and responsible authorities in downstream communities of any condition which threatens the safety of the facility, and take all necessary actions to protect life and property, including any action required under an emergency plan or department order issued pursuant to this act; and

(4) prior to discontinuing use or abandonment, remove all or part of the facility and take other actions necessary to protect safety and the environment in a manner approved by the department.

Section 14. Investigation and correction of unsafe conditions.

(a) Whenever the department finds there is reasonable cause to suspect the existence of conditions adversely affecting the safety of a dam, ***water obstruction or encroachment***, the department may order the owner to conduct such investigations, tests and analyses as may be required to determine the continuing safety of the facility.

(b) If the department determines that any dam, ***water obstruction or encroachment*** is unsafe or adversely affects property or the environment or has not been properly constructed, operated, monitored or maintained in compliance with this act, it may order the owner of the facility to repair, alter, maintain or remove the facility or take such other action necessary to carry out the purposes of this act, within such time as prescribed in the order.

(c) If :

(1) the owner cannot be ascertained or found;

(2) the owner refuses or fails to comply with an order issued pursuant to this section; or

(3) the condition of the facility is so dangerous as to require immediate remedial action;

the department or its authorized agents may enter and conduct such investigations, tests and analyses or take such corrective action as required to carry out the purposes of this act. The department thereafter may recover from the owner, in the name of the Commonwealth, the expenses incurred in taking such action, in the same manner as debts are recoverable by law.

Section 15. Projects affecting submerged lands of the Commonwealth.

(a) No permit shall be granted pursuant to this act for any project to occupy submerged lands of the Commonwealth in any navigable lake or river or stream declared a public highway, unless the applicant has obtained an easement, right-of-way, license or lease pursuant to this act, or holds an estate or interest in such submerged lands pursuant to other specific authority from the General Assembly.

(b) The department may, with the approval of the Governor, grant an easement, right-of-way, license or lease to occupy submerged lands of the Commonwealth in any navigable lake or river or stream declared a public highway, for any **[project regulated under this act] dam, water obstruction or encroachment** which is constructed for the purpose of:

- (1) improving navigation or public transportation;
- (2) recreation, fishing or other public trust purposes;
- (3) protecting public safety or the environment;
- (4) providing water supply, energy production or waste treatment;
- (5) providing a public utility service by a government agency or subdivision or public utility **or electric cooperative**; or
- (6) other activities which require access to water.

Such easement, right-of-way, lease or license shall provide for the payment to the Commonwealth of compensation for the use of its property in such amount and shall be subject to such terms and conditions as the department shall, with the approval of the Governor, prescribe.

(c) The total area of land which any such project may occupy under one or more easements, rights-of-way, licenses or leases **granted by the department** pursuant to this section shall not exceed **[ten] 25** acres.

(d) No easement, right-of-way, lease or license may be granted under this section which may adversely affect navigation or significantly impair the public's right in lands held in trust by the Commonwealth.

(e) No title, easement, right-of-way or other interest in submerged lands or other real estate of the Commonwealth may be granted except as expressly provided by this section or other specific authority from the General Assembly.

Section 17. **[Delegations] Intergovernmental coordination and delegations** to local agencies.

(a) In accordance with regulations adopted by the Environmental Quality Board, the department may by agreement delegate to a county conservation district or other county agency one or more of its regulatory functions to permit, inspect and monitor designated categories of dams, **water obstructions and encroachments** and to enforce this act and regulations adopted hereunder relating to such designated categories. Any county conservation district or other agency acting pursuant to a delegation agreement shall have the same powers and duties otherwise vested in the department to implement this act, to the extent delegated by the agreement.

(b) The department shall monitor and supervise the activities of each county conservation district or agency conducted pursuant to the agreement.

(c) Any provision of **[the act of December 2, 1968 (P.L.1133, No.353), known as]** the "Local Agency Law," notwithstanding, any person aggrieved by an action of a county conservation district or other agency pursuant to a delegation agreement may appeal such action to the department within 30 days following notice of such action. Any action of

the department pursuant to such an appeal may be appealed to the Environmental Hearing Board in accordance with section 24.

(d) The department shall cooperate and coordinate with the United States Army Corps of Engineers and other appropriate Federal and interstate agencies for the purpose of assuring efficient regulation, permitting and inspection of dams, water obstructions and encroachments. The department is authorized, with the approval of the Attorney General, to enter into administrative agreements with appropriate Federal and interstate agencies for the following purposes:

- (1) to facilitate the submission and coordinated review of permit applications;*
- (2) to avoid unnecessary duplication of staff functions and hearings;*
- (3) to provide for coordinated inspection, monitoring and enforcement of application laws and regulations; and*
- (4) to accept delegations of authority from Federal and interstate agencies relating to the regulation of dams, water obstructions and encroachments.*

Section 18. Unlawful conduct.

It shall be unlawful for any person to:

- (1) Violate or assist in the violation of any of the provisions of this act or of any rules and regulations adopted hereunder.
- (2) Fail to comply with any order by the department issued hereunder from which no appeal has been taken, which has been sustained on appeal, or which has been appealed for which no supersedeas has been granted for the period in which violation occurs.
- (3) Construct, enlarge, repair, alter, remove, maintain, operate or abandon any dam, **water obstruction or encroachment** contrary to the terms and conditions of a general or individual permit or the rules and regulations of the department.
- (4) Attempt to obtain a permit by misrepresentation or failure to disclose all relevant facts. Nothing in this act shall be construed to affect the application of any provision of the Crimes Code relating to perjury, false swearing or unsworn falsification to authorities.
- (5) Intentionally obstruct, impair or pervert the administration of this act by the department or any municipality by force, violence, physical interference or obstacle, breach of official duty or any other unlawful act. Nothing in this act shall be construed to affect the application of section 5101 of the Crimes Code to obstructing administration of law or other governmental function.

Section 19. Civil remedies.

(a) Any activity or condition declared by this act to be unlawful conduct shall be restrained or prevented in the manner provided by law or equity for abatement of public nuisances, and the expense thereof shall be recoverable from the violator in such manner as may now or hereafter be provided by law.

(b) In addition, suits to restrain or prevent any unlawful conduct as defined in this act or to compel action to discontinue any unlawful conduct may be instituted in equity or at law in the name of the Commonwealth upon relation of the Attorney General, or upon relation of any district attorney of any county or upon relation of the solicitor of any municipality affected after 30 days notice has first been served upon the Attorney General of the intention of the district attorney or solicitor to so proceed. Such proceedings may be prosecuted in the Commonwealth Court, or in the court of common pleas of the county where the activity has taken place, the dam, **water obstruction or encroachment** is maintained or the public is affected, and to that end jurisdiction is hereby conferred in law and equity upon such courts: Provided, That except in cases of emergency where, in the opinion of the court, the exigencies of the cases require immediate abatement of said unlawful conduct, the court may, in its decree, fix a reasonable time during which the person responsible for the unlawful conduct may make provision for the same. The expense of such proceedings shall be recoverable from the violator in such manner as may now or hereafter be provided by law.

Section 23. Summary proceedings.

All summary proceedings under the provisions of this act may be brought before any magistrate, alderman or justice of the peace of the county where the unlawful conduct has occurred or the dam, **water obstruction or encroachment** is maintained, or the public affected, and to that end jurisdiction is hereby conferred upon said magistrates, aldermen or justices of the peace, subject to appeal by either party in the manner provided by law. In the case of any appeal from any such conviction in the manner provided by law for appeals from summary conviction, it shall be the duty of the district attorney of the county to represent the interests of the Commonwealth.

Section 25. Preservation of existing rights and remedies.

The collection of any penalty under the provisions of this act shall not be construed as estopping the Commonwealth, or any district attorney or solicitor of a municipality, from proceeding in courts of law or equity to abate conduct forbidden under this act, or abate nuisances under existing law. It is hereby declared to be the purpose of this act to provide additional and cumulative remedies to abate unsafe dams, **water obstructions or encroachments** in this Commonwealth, and nothing in this act contained shall in any way abridge or alter rights of action or remedies now or hereafter existing in equity, or under the common law or statutory law, criminal or civil, nor shall any provision in this act, or the granting of any permit under this act, or any act done by virtue of this act, be construed as estopping the Commonwealth, persons or municipalities, in the exercise of their rights under the common law or decisional law or in equity, from proceeding in courts of law or equity to suppress nuisances, or to abate any unsafe dam now or hereafter existing, or enforce common law or statutory rights.

Section 26. Dams *and Encroachments* Fund.

All fines collected under the penal provisions of this act and all civil penalties collected under this act shall be paid into the Treasury of the Commonwealth in a special fund known as the Dams *and Encroachments* Fund, which shall be administered by the department for use in protecting the citizens of the Commonwealth from the hazards to life, property, and the environment resulting from unsafe dams, *water obstructions and encroachments*. Disbursements from the fund shall be in accordance with rules and regulations prescribed by the Environmental Quality Board.

Section 27. Repealer and savings clause.

(a) The following acts and parts of acts and supplements thereto are hereby repealed absolutely:

The act of March 23, 1803 (P.L.389, No.140), entitled "An act to authorise any person or persons owning lands adjoining navigable streams of water, declared public highways, to erect dams upon such streams, for mills and other water-works."

Sections 7 and 8 of the act of June 8, 1907 (P.L.496, No.322), entitled "An act to establish a Board of Commissioners of Navigation for the river Delaware and its navigable tributaries; regulating their jurisdiction over ships, vessels, and boats, and wharves, piers, bulkheads, docks, slips, and basins; and exempting cities of the first class from certain of its provisions; and making an appropriation therefor."

The act of June 25, 1913 (P.L.555, No.355), entitled "An act providing for the regulation of dams, or other structures or obstructions, as defined herein, in, along, across, or projecting into all streams and bodies of water wholly or partly within, or forming part of the boundary of, this Commonwealth; vesting certain powers and duties in the Water Supply Commission of Pennsylvania, for this purpose; and providing penalties for the violation of the provisions hereof." [**only so far as it relates to dams and reservoirs.**]

(b) All other acts or parts of acts inconsistent herewith are hereby repealed to the extent of such inconsistency.

(c) The provisions of this act shall not effect any suit, prosecution, or other instituted to enforce any right or abate any violation of any act or part thereof repealed by this act.

Section 2. This act shall take effect immediately.

APPROVED—The 23rd day of October, A. D. 1979.

DICK THORNBURGH