

Gov'r 31st H₂O Conference Dam Safety Legal Issues

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Discussion Topics

1. The Dam Safety Problem
2. Dam Safety Rule Changes
3. Govt. Liability Issues

Janet Stewart – NRCS
Tom Lay – Liability Cases



I'll leave the dam jokes
to the professionals

1. The Problem

- Over 79,000 public and private dams in the U.S.
- 4.7% (3,700) are owned by the federal govt.
- 95% (75,300) are state, local and privately owned.

75,300 non-federal dams

- State, local and private owners are responsible for their maintenance and safety.
- 45% (44,000) are privately owned.
- 4,500 (6%) are regulated by the OWRB in Oklahoma.

75,300 non-federal dams

- 30% (24,000) were built with federal assistance.
- >10,500 were built since 1948 by the NRCS (and prior SCS) as upstream flood control dams.
- 2,105 (20%) are in Oklahoma.

2,105 Okla. NRCS dams

- Began with Federal Flood Control Act of 1944.
- Many nearing end of useful life and need rehab.
- ~ 200 could be reclassified to high hazard due to downstream development in inundation areas.

4,500 OWRB dams

- 2,105 in conservation districts, about 200 need upgrade.
- 2,400 local and private, number to upgrade not yet known.
- Rehab. \$100k +
Upgrade \$1Million +

\$400M ++

- ~200 conservation district upgrades
- ~1,800 cons. district rehabs.
- local and private needs are not yet known.

Federal influence

- National Dam Inspection Act of 1972, required inventory and inspections.
- 1996 dam safety was expanded to cover non-federal dams and placed under FEMA.
- 1998 new stds. with revised hazard classification: low, significant and high – based on downstream risk, not the current condition of the dam.



Federal \$\$??

- In the year 2000, the NRCS estimated that it would take over \$540M just to rehab. their aging flood-water retention projects.
- Last funding in 2002 was only \$275M and required 35% local match.
- Did I mention that 1/5 or 20% of these dams are in Oklahoma?
- Plus upgrades, plus local & private dams.

Federal Σ

- States not required to meet federal dam safety guidelines. However, states that do are eligible for federal assistance.
- Congress has not established priorities for non-federal dams.
- Ref.: "Aging Infrastructure: Dam Safety"
Congressional Research Service 2008.
Many publications available on FEMA website.

2. Rule Changes



Oklahoma program

- OWRB first adopted dam safety rules in 1973, based on the National Dam Inspection Act of 1972.
- Oklahoma Dam Safety Act was enacted in 1992. Begins at 82 O.S. Section 110.1. It affirmed the existing program and directed new rules to meet the federal guidance (done in 1993).
- 2010 rules designed to comport with the federal circa. 1998 hazard classification guidelines.

2010 major revisions

- Hazard classifications were revised to match the federal classifications.
- Recognizing that upgrades will take time, more detail was added to the emergency action plans.
- The two lower classes must prepare a simplified version. High-hazard dams must have an EAP that meets federal guidelines (available from FEMA).

3. Govt. Liability Issues



Federal law

- The national dam safety program specifically provides that no act or failure to act under that law creates any liability on the U.S. or its officers.
- Nor does it relieve any owner or operator of a non-federal dam of legal duties or liabilities. 33 USC 467i.

Okla. law

- Tort liability of the State and its political subdivisions is described in the Govt. Tort Claims Act, 51 O.S. Section 151 and following.
- Provides govt. immunity for certain acts, and limits liability so citizens who are injured can be compensated without breaking the sovereign bank.

Tort Claims

- Of course covers agencies like OWRB. Also covers cities and towns, and local conservation districts.
- Liability for single occurrence is generally limited to \$25k for property of one claimant, \$125k for injury to one claimant, and \$1M for any number of claims per occurrence.

Govt. is Immune, § 155

- Adopt or enforce, or fail to adopt or enforce, a statute, rule, ordinance.
- Issuing or failure to issue, revoke or suspend a license.
- Inspection powers, including failure to inspect or make an inadequate or negligent inspection.

Govt. Immunity, cont.

- Acts or omissions of independent contractors or consultants.
- Acts or omissions done in conformance with the then current recognized standards.
- Remedial actions and maintenance of property law a state or federal env'r agency.

No Govt. Immunity

- For contractual claims. 1975 OK 144.
- Conservation district easement found to have duty to maintain water quality. 2000 OK 96.
- Venue is in county where dam is located. 51 O.S. § 163.

Misc.

- District easement could confer liability for injuries from hidden dangers. 2005 OK AG 35.
- Insurance can alter tort claims limits.
- Legislature put the burden on districts to rehab and upgrade.
27A O.S. § 3-3-411 (2008)
- If upgrade increases height, inundation area increases in reservoir & downstream.



Vincent Van Gogh
The Drawbridge, c. 1888