

# In the Board Room

with *Attorney Andy Phillips* and

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## DAM IT! A COUNTY'S RELATIONSHIP WITH THE DNR AND PROPERTY OWNERS IN THE UPKEEP, REPAIR AND CONDITION OF DAMS

June 28, 2023

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# Agenda

- History of Dams In Wisconsin
- Important DNR Dam Facts
- Legal Landscape
- Case Studies

The background is a solid blue color with a series of concentric circles and a dashed line. The circles are centered on the left side of the image and expand outwards towards the right. A dashed line follows the path of one of the circles, starting from the left and curving around towards the right.

# ▼ History of Dams in Wisconsin

# Regulatory History

- First dam built in Wisconsin in 1809 to provide power for a sawmill on the Fox River.
- First state regulation of dams began with the Milldam Act (1840, No. 48) to encourage the construction of millpowering dams. Permitted flooding of land of others *without* acquiring easements.
- Milldam Act repealed in 1849 (ch. 157) when SCOWIS addressed constitutionality of preventing compensation. But Milldam Act revived in 1857, repealed and recreated in 1858 and then SCOWIS in 1860 *would* have overruled the Act if not for precedent and economic benefits.

Source: <https://dnr.wisconsin.gov/topic/dams/history.html>

# Regulatory History

- In 1909 Legislature delegated regulatory authority for dams, first to Railroad Commission and then to PSC.
- In 1967 Wisconsin DNR created and jurisdiction over dams transferred from PSC to DNR (note impact of pre-1967 PSC orders).
- Early 1980s DNR developed standards for design, construction and reconstruction of dams.
- Today DNR issues permits for new dam construction, repairs, reconstruction, ownership transfers, water levels and abandonment.

Source: <https://dnr.wisconsin.gov/topic/dams/history.html>



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# ▼ Important Dam Facts

# DNR Facts

- **Number of dams in the state:** There are approximately 3,900 dams currently in existence in Wisconsin. Since the late 19th century, approximately 900 dams have been built then washed out or removed.
- Over 150 dams have been removed from Wisconsin streams since 1960.
- **Percentage of dams by ownership type:** 60% of the dams in Wisconsin are owned by a company or private individual, 9% by the State of Wisconsin, 17% *by a municipality such as a township or county government*, and 14% by other ownership types.
- **Jurisdiction:** The federal government has jurisdiction over most large dams in Wisconsin that produce hydroelectricity – approximately 5% or nearly 200 dams. The DNR regulates most of the remaining dams in the state. Some dams or dam-like structures are not regulated by the state because they are not on a watercourse, impound a liquid substance other than water or are associated with a cranberry operation.

<https://dnr.wisconsin.gov/topic/dams/DamsOverview.html>



# Legal Landscape



# Powers and Duties of DNR

- The department,
  - in the interest of public rights in navigable waters,
  - to promote safety, and
  - to protect life, health, property, property values, and economic values
- may regulate and control the level and flow of water in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated
  - the maximum level of water that may be impounded and
  - the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained and which will affect the level and flow of navigable waters; and may by order fix a level for any body of navigable water below which the same shall not be lowered except as provided in this chapter; and
- shall establish and maintain gauging stations upon the various navigable waters of the state and
- shall take other steps necessary to determine and record the characteristics of such waters.

*See Wis. Stat. § 31.02.*

# Applications for Permits / Approvals

- Permits or approvals are required or may be required for various activities associated with dams including:
  - building a new dam;
  - repairing or reconstructing an existing dam;
  - raising and enlarging an existing dam;
  - transferring ownership of a dam;
  - removing a dam; and
  - altering the water level being held by a dam.

# Constructing a New Dam

- Any person, firm, corporation or municipality desiring a permit to construct, operate and maintain a dam shall file with the department a written application.
- The department may order a hearing *or* it may mail a notice that it will proceed on the application without public hearing unless a request for a public hearing is filed.
- If it appears that the construction, operation or maintenance of the proposed dam is in the public interest, considering ecological, aesthetic, economic and recreational values, the department shall so find and grant a permit to the applicant.
- In considering public rights to the recreational use and natural scenic beauty of the river, the department shall
  - investigate the potentialities of the lake and lakeshore created by the flowage and shall weigh the recreational use and scenic beauty of the lake and lakeshore against
  - the known recreational use and scenic beauty of the river in its natural state.
  - The department shall further weigh the known recreational use and scenic beauty of the particular section of river involved against the known recreational use and scenic beauty of other sections of the same river and other rivers in the area remaining in their natural state without regard to plans of other dams subsequently filed or to be filed.

See Wis. Stat. §§ 31.05 and 31.06.

# Constructing a New Dam

- The department shall deny the permit if it finds any of the following:
- It appears that the river in its natural state offers greater recreational facilities and scenic value for a larger number of people than can by proper control of the flowage level be obtained from the use of the lake and lakeshore and that the remaining sections of the river and other rivers in the area in their natural state provide an insufficient amount of recreational facilities and scenic beauty, and it further appears that the economic need of electric power is less than the value of the recreational and scenic beauty advantages of the river in its natural state.
- The permit will cause environmental pollution, as defined in s. 299.01 (4).

*See Wis. Stat. §§ 31.05 and 31.06.*

# Raising or Enlarging Existing Dams

- If the owner of any existing dam wishes to raise or enlarge the same, the owner may apply to the department for permission so to do.
- But shall in no way enlarge, alter, abridge or nullify property rights, privileges or obligations as to such dam, or the maintenance or operation thereof.
- An application must include:
  - A detailed description of the dam, including the maximum height or head of water that may be maintained thereby and the kind and character of material of which the same is constructed and
  - The purpose for which such dam has been and is now used and the purpose for which it is proposed to use the same.

*See Wis. Stat. § 31.13.*

# Obligations of Owners

- The grantee of a permit shall maintain and operate all such dams, slides, chutes, piers, booms, guide booms, weirs, tunnels, races, flumes, sluices, pits, fishways, locks, boat hoists, marine railways and all other equipment required by the department
  - for the protection of public rights in such waters, and
  - for the preservation of life, health and property, in good repair and condition, and
  - shall not willfully, or otherwise, injure, remove or destroy the same, or any part thereof, unless the department shall have approved such removal or destruction in writing.
  - Except when emergency shall require the same for the protection of life, health or property, no **substantial alteration or addition** shall be made to any dam heretofore or hereafter constructed without obtaining an order therefor from the department, which order may be issued only after an investigation and upon a finding that the proposed alterations or additions will not impair the sufficiency of such dam or any existing public rights in such waters.

*See Wis. Stat. § 31.18.*



# Inspections of Dams

- “High hazard dam” means a large dam the failure of which would probably cause loss of human life.
- “Low hazard dam” means a large dam the failure of which would probably not cause significant property damage or loss of human life.
- “Significant hazard dam” means a large dam the failure of which would probably cause significant property damage but would probably not cause loss of human life.

*See Wis. Stat. § 31.19(1g)(a)-(c).*

- A dam is considered to be a large dam if either of the following applies:
  - It has a structural height of 25 feet or more and impounds more than 15 acre-feet of water.
  - It has a structural height of more than 6 feet and impounds 50 acre-feet or more of water.

# Large Dam Inspections

- **Inspection by DNR:** At least once every 10 years the department shall conduct a detailed inspection of each high hazard dam and each significant hazard dam.
- **Inspection by Owner:** Owners of each high hazard dam, each significant hazard dam, and each low hazard dam shall engage a professional engineer registered under s. 443.04 to inspect the dam.
  - An owner of a high hazard dam shall cause the dam to be inspected at least 4 times between each inspection conducted by the department.
  - An owner of a significant hazard dam shall cause the dam to be inspected at least 2 times between each inspection conducted by the department.
  - An owner of a low hazard dam shall cause the dam to be inspected at least once every 10 years.
- The owner of a dam required to be inspected shall submit to the department, no later than 90 days after the date of the inspection, a report of the results of the inspection.
  - The report shall include information on any deficiencies in the dam, recommendations for addressing those deficiencies, and recommendations on improving the safety and structural integrity of the dam.
- Inspection is not required if the dam is inspected periodically by or under the supervision of a federal agency in a manner which is acceptable to the department and if the results of each inspection are made available to the department.

# Large Dam Inspections

- If the department receives a complaint in writing from the mayor of a city, supervisor of a town or the president or trustee of a village which alleges that a dam is in an unsafe condition or if the department receives a complaint in writing from a person which alleges that the person's property or any property under the person's control is endangered by a dam or reservoir, the department shall investigate or cause an investigation to be made of the complaint.
  - No role for Counties.
- DISCRETIONARY INSPECTION. The department may inspect or cause an inspection to be made of any dam or reservoir.
- If the department finds pursuant to an investigation that a dam or reservoir is not sufficiently strong or is unsafe and that the dam or reservoir is dangerous to life or property, it shall determine what alterations, additions or repairs are necessary and shall order the owner or person having control of the dam or reservoir to cause those alterations, additions or repairs to be made within a time specified in the order.
- If the department finds pursuant to an investigation that a dam or reservoir is not sufficiently strong or is unsafe and that the dam or reservoir is dangerous to life or property, it may cause to be drawn off, in whole or in part, the water in the reservoir or impounded by the dam if it determines that this action is necessary to prevent impending danger to persons or property.

# Abandoning a Dam

- No owner of any dam may abandon or remove or alter the dam without first obtaining a permit from the department.
- No person may transfer ownership of a dam or the ownership of the specific piece of land on which a dam is physically located without first obtaining a permit from the department.
- Prior to the hearing the department shall have its staff make its own investigation of the dam and, on the basis of such investigation, shall make recommendations as to the type of requirements, if any, which it would impose on the applicant as a condition to granting the permit. Such recommendations shall be presented at the hearing.
- If no one registers opposition to the application at the hearing, the department shall grant the permit, subject to such conditions as it deems necessary.
- If someone registers opposition to the abandonment at the hearing and such opposition is not withdrawn, the department shall defer action on the application for a period of 120 days after the hearing. Within a reasonable time after the expiration of such period, the department shall deny the permit, or grant the permit, subject to such conditions as it imposes, unless, within such 120-day period, one or more municipalities or other persons or associations have agreed to acquire ownership of the dam and have furnished satisfactory proof of intent to comply with s. 31.14 (2) or (3).
- The department may require the applicant to comply with such conditions as it deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health, property, property values, and economic values

See Wis. Stat. § 31.185.

# Transferring a Permit

- No transfer or assignment of any permit granted under s. 31.06 or 31.08 shall be of any effect whatsoever unless
  - it is in writing and
  - a certified copy thereof within 10 days after the execution thereof, is filed with the department and
  - unless such transfer or assignment is approved in writing by the department; and
  - no such transfer or assignment shall be approved by the department except after an investigation and a finding that the transfer or assignment is not made or intended to be made for a purpose or to create a condition prohibited by law.
- No permit shall be transferred or assigned to a foreign corporation, nor shall any permit granted to a municipality be assigned or transferred to any person, otherwise than as security for a loan made in good faith and concurrently with and as consideration for such transfer or assignment.

*See Wis. Stat. § 31.21.*

# Removing a Dam

- Several major issues can lead to dams needing to be removed in Wisconsin.
  - Removal of an unsafe structure under Section 31.19, Wis. Stats. If a dam is found to be unsafe, usually after an inspection, the owner of the dam is offered the option of repairing the dam to meet current standards or abandoning the permits for the dam and removing it from the waterway.
  - Sec. 31.187, Wis. Stats., charges the Wisconsin DNR with removing "abandoned" dams when no owner is found or the owner or owners are not able to maintain or repair their dam for a significant period of time essentially abandoning the dam.
  - In a few cases, it has been proposed to remove dams that have a significant environmental impact. Many of those are on Wisconsin DNR properties.
  - The dam was not authorized prior to construction and no entity is willing to be responsible for the safe operation and maintenance or complete the authorization process.



# Removing a Dam

- There are NO exemptions for dam abandonments.
- Prior to seeking or causing the removal of a dam, the department shall hold a public informational hearing on the proposed removal or publish a class 2 notice under ch. 985 stating that it will seek or cause the removal of the dam without holding a public informational hearing unless a hearing is requested in writing within 30 days after the last publication of the notice.
- The department shall explain the basis for its decision to seek or cause the removal of the dam, the procedures which will be followed and opportunities for citizen involvement in those procedures and the department shall provide an opportunity for citizens to present comments, testimony and evidence concerning the removal of the dam.
- Notwithstanding s. 227.42, this hearing may not be converted or treated as a contested case.

*See Wis. Stat. § 31.253.*



# Relevant Administrative Code

- NR 330 - provides signing and portage requirements for dams in the state.
- NR 333 - provides design and construction standards for large dams.
- NR 335 - covers the administration of the Municipal Dam Grant Program.
- NR 336 - covers the administration of the Dam Removal Grant Program.

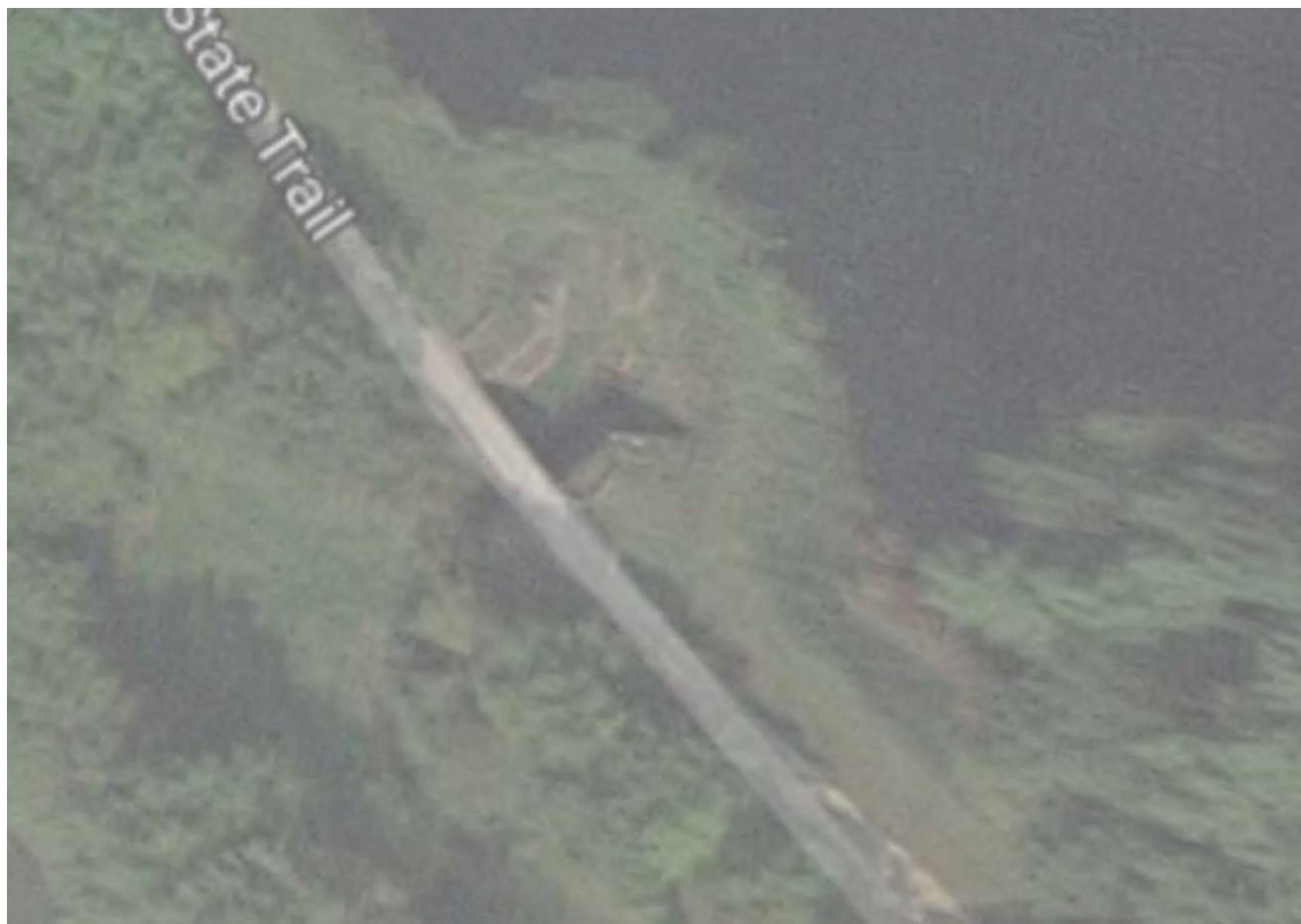
# Grant Program: Municipal Dam Grant

- An applicant must own the entire dam or have permanent legal access for operation and maintenance to the specific piece of land on which the dam is physically located.
- Eligible projects include dam repair, reconstruction or modification to improve the safety of the dam, or abandonment and removal. The owner must have the inspection directives or an administrative order that requires the dam safety project.
- Dam repair/reconstruction/modification project grant awards will cover:
  - 50 percent of the first \$1,000,000 of eligible project costs;
  - 25 percent of the next \$2,000,000 of eligible project costs; and
  - Dam abandonment and removal project grant awards will cover 100 percent of the first \$1,000,000 of eligible project costs.

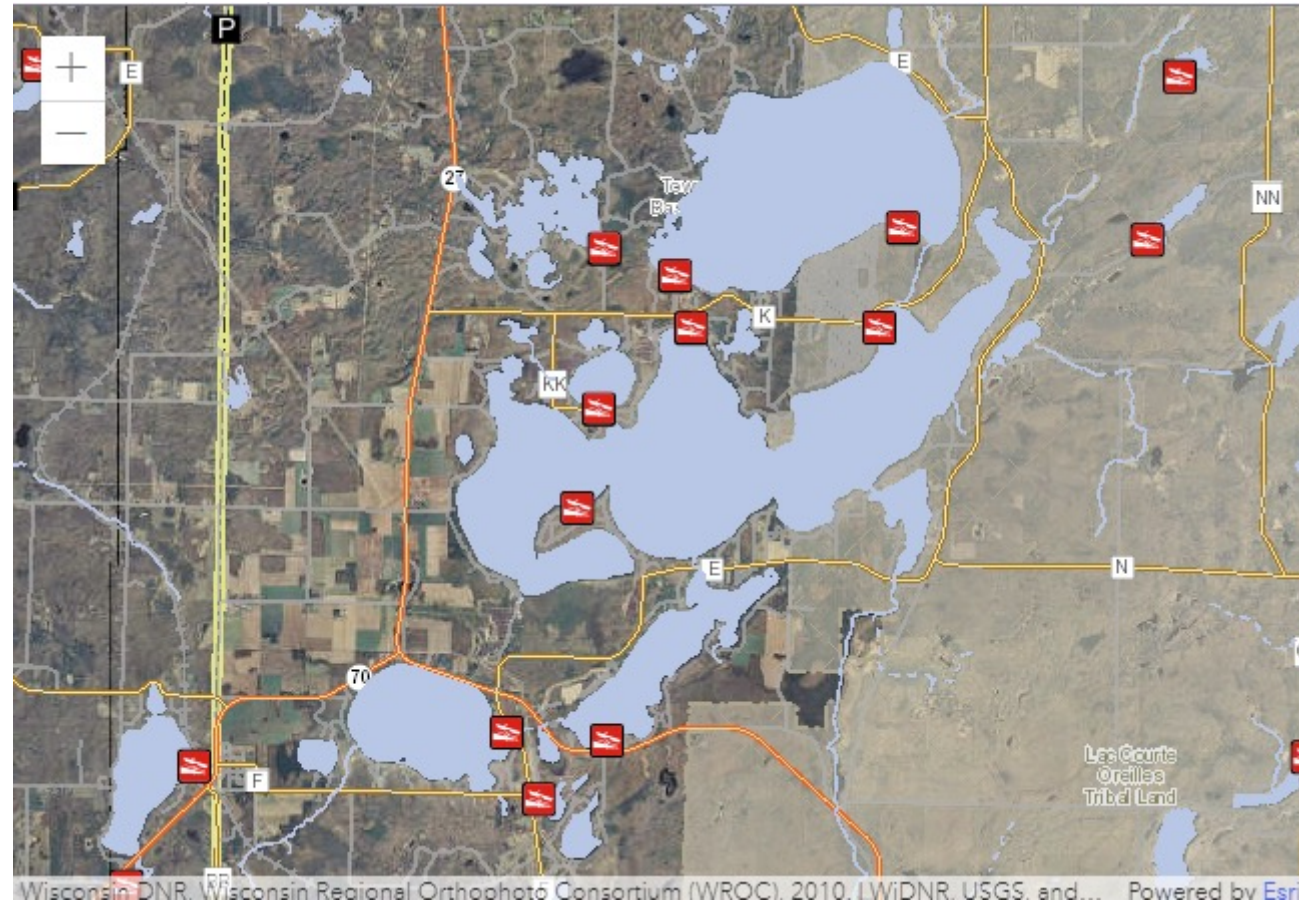
# Grant Program: Dam Removal Grant

- The DNR will reimburse 100 percent of eligible project costs up to a maximum grant award of \$50,000.
- Eligible project costs include labor, materials and equipment directly related to planning the actual removal, the dam removal itself and the restoration of the impoundment.
- The project sponsor is responsible for ineligible costs and project costs in excess of the maximum grant award.
- An applicant may not receive a grant from both the Municipal Dam Grant Program and the Dam Removal Grant Program for the removal of the same dam.

## Case Study: Hemlock Dam, Sauk County



## Case Study: Billy Boy Dam, Sawyer County







**QUESTIONS & ANSWERS**

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