

BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of amendment of ARM) NOTICE OF PUBLIC HEARING ON
36.14.101, 36.14.201, 36.14.309,) PROPOSED AMENDMENT AND
36.14.402, 36.14.406, 36.14.407,) REPEAL
36.14.501, 36.14.601, 36.14.602, and)
36.14.603 and the repeal of ARM)
36.14.311 pertaining to Dam Safety)

TO: All Concerned Persons

1. On August 9, 2022, at 10:00 a.m., the Department of Natural Resources and Conservation will hold a public hearing in the Montana Room, First Floor, located at 1539 Eleventh Avenue, Helena, MT, and via Zoom, to consider the proposed amendment and repeal of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

- a. Join Zoom Meeting: <https://mt.gov.zoom.us/j/89397282722?pwd=TFR0N1QrS3JYemtPdHBsZDNQdzViZz09>; Meeting ID: 893 9728 2722; Password: 061282; or
- b. Dial by Telephone: +1 646 558 8656 or +1 406 444 9999; Meeting ID: 893 9728 2722; Password: 061282

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on July 29, 2022, to advise us of the nature of the accommodation that you need. Please contact Jamie Price, Department of Natural Resources and Conservation, 1539 Eleventh Avenue, P.O. Box 201601, Helena, MT 59620-1601, 406-444-6615, or e-mail jsprice@mt.gov.

3. The rules proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

36.14.101 DEFINITIONS In addition to the terms defined by 85-15-106, MCA, the following definitions apply in this subchapter, unless the context requires and clearly states otherwise.

(1) and (2) remain the same.

(3) "Certification" means a statement of opinion by an engineer whose work on a dam has been conducted in accordance with the standard of care within dam engineering practice. Certification does not constitute a warranty or guarantee of facts or conditions certified.

(3) through (8) remain the same but are renumbered (4) through (9).

(10) "Five-year dam evaluation" means an assessment of the safety and performance of a dam based on both a visual inspection and a safety evaluation.

- (9) through (11) remain the same but are renumbered (11) through (13).
(12) and (12)(a) remains the same but are renumbered (14) and (14)(a).
(b) means the elevation of the emergency auxiliary spillway for flood control structures; and
(c) remains the same.
(13) remains the same but is renumbered (15).
(16) "Operation and maintenance inspection" means the inspection of the dam that is performed on an annual basis by the dam owner as part of regular operation and maintenance activities.
(14) and (15) remain the same but are renumbered (17) and (18).
(19) "Safety evaluation" means the assessment of dam condition that is typically accomplished through an analysis of instrumentation, stability, seepage, hydraulic adequacy, hydrologic adequacy, and compliance with current standards.
(20) "Visual inspection" means a physical visit to the dam by a qualified engineer to assess the condition and safety of the dam and features associated with the dam.

AUTH: 85-15-110, MCA

IMP: 85-15-106, 85-15-209, 85-15-210, 85-15-212, MCA

REASON: Defining certification provides clarity for the engineer's role within the standards of professional practice. The proposed definition of certification comes from the Association of State Dam Safety Officials, and 82-4-303, MCA has a similar definition for tailings dams.

Clarifying terminology for the types of dam inspections and evaluations required by the administrative rules and 85-15-213, MCA is necessary to avoid misinterpretation of requirements. Differentiation from the inspection that is typically completed by the dam owner from the inspections that require a licensed engineer is necessary.

The word "emergency" when referring to a spillway is no longer used in the dam safety industry. The word "auxiliary" is preferred.

36.14.201 WHO HAS TO APPLY FOR HAZARD DETERMINATION

- (1) and (1)(a) remain the same.
(b) An owner of a dam may request a waiver to the application requirement if:
(i) the dam is not high-hazard as previously classified by the department;
(ii) no additional downstream development has occurred; and
(iii) the size and impounding capacity of the dam is unchanged from the department's original classification.
(2) The department must respond to the waiver request in (1)(b) within 20 calendar days.
(2) remains the same but is renumbered (3).

AUTH: 85-15-110, MCA

IMP: 85-15-107, 85-15-209, MCA

REASON: As it exists presently, a hazard determination application is necessary whenever construction is proposed on a dam, including dams that have previously gone through the determination process and have been classified by the department as not high-hazard. This amendment provides for a waiver where certain conditions are met to allow dam owners the ability to proceed more quickly to construction.

36.14.309 CONSTRUCTION PERMIT - STANDARD TERMS (1) and (1)(a) remain the same.

~~(b) the owner shall provide the department evidence that a performance bond has been obtained by the contractor for the completion of construction of the dam in the amount of at least 100% of the estimated cost of the project;~~

(c) through (i) remain the same but are renumbered (b) through (h).

AUTH: 85-15-110, MCA

IMP: 85-15-210, MCA

REASON: While performance bonding is important, ARM 36.14.309(1)(b) is not needed for public dam owners since 18-2-201, MCA, provides for performance security requirements for public construction contracts. If a contractor defaults midway through a project, 85-15-215, MCA and ARM 36.14.703 provide the department emergency authority to act by intervening in a construction project and holding the dam owner responsible where needed to protect the public.

36.14.402 OPERATION PERMIT APPLICATION - GENERAL REQUIREMENTS (1) Applications, including applications for renewal of a permit to operate high-hazard dams must include:

(a) an operation plan pursuant to ARM 36.14.403; and

~~(b) notification that an inspection has been completed, except for a new dam for which a construction permit has been issued.~~

~~(2)(b) a report of the five-year dam evaluation inspection pursuant to ARM 36.14.603; must be submitted to the department within 90 days of the inspection, before the application can be considered complete.~~

(c) a statement of the owner's intent regarding any deficient or unsafe items identified by the report; and

(d) a time schedule to remedy the deficient or unsafe items.

(2) The requirements in (1)(b) through (d) do not apply for a new dam for which a construction permit has been issued. The inspection report of the evaluation must be of the dam in its condition and configuration at the time of the application and must be submitted within 90 days of the visual inspection. If the owner of the dam has opted to split the visual inspection into two separate visits to the dam site, the 90-day requirement begins with the date of the second visual inspection.

(3) and (4) remain the same.

AUTH: 85-15-110, 85-15-213, MCA

IMP: 85-15-212, MCA

REASON: These amendments are reasonably necessary to clarify operation permit application requirements. A portion of the proposed new language is currently contained in ARM 36.14.601 and was determined to be out of place. Pursuant to ARM 36.14.602 and 36.14.603, the periodic owner inspection must contain both a visual inspection and a safety evaluation of dam performance. The amendments better reflect the contents of ARM 36.14.602 and 36.14.603 and are consistent with long-standing department requirements.

If a dam owner splits the visual inspection into two visits pursuant to proposed amendments to ARM 36.14.601, the report submittal requirement that is based on the second visual inspection is needed to ensure the report addresses findings from both visits.

36.14.406 OPERATION PLAN - EMERGENCY PROCEDURES AND WARNING PLANS (1) remains the same.

(2) The plan must be developed in cooperation with those designated by the owner for carrying out the plan in an emergency, such as county disaster emergency coordinators, county sheriff, city police, engineer, and others. ~~A written statement of agreement to participate in the plan must be signed by those responsible and be attached to the plan.~~

(3) The owner shall file the plan with the appropriate disaster and emergency services coordinator, ~~after approval by the department and the owner shall provide certification of its filing to the department.~~

(4) remains the same.

(a) a map of the evacuation area downstream of the dam based on the estimated inundation caused by a sudden breach of the dam ~~during the design flood and non-flooding failure conditions. The evacuation area must be depicted on a USGS quadrangle map with the approximate travel time indicated at significant locations;~~

(b) an up-to-date notification directory with phone numbers of key county or municipal and emergency management officials, an engineer familiar with the dam's characteristics, the department, and a procedure to notify downstream residents located requiring immediate notification within the inundation area ~~(listed in order by those affected first), and the department;~~

(c) through (5) remain the same.

AUTH: 85-15-110, MCA

IMP: 85-15-212, MCA

REASON: The current process of requiring signatures and certifications on the emergency plans causes substantial delays in the distribution of the plans.

The type of downstream evacuation map to be included in the plan depends on the dam and other unique circumstances. Decisions regarding what is depicted on the evacuation maps should remain with the dam owners in consultation with their engineers and local emergency responders.

Modern reverse 911 notifications and widespread use of mobile phones have eliminated the need for prescriptive requirements on how downstream residents should be listed in the evacuation plan.

36.14.407 OPERATING PERMIT - CONDITIONS AND TERMS (1) and (1)(a) remain the same.

(b) the owner of the dam or reservoir, or their representative, shall complete an annual operation and maintenance inspection;

(b) through (g) remain the same but are renumbered (c) through (h).

(2) through (4) remain the same.

AUTH: 85-15-110, 85-15-213, 85-15-216, MCA

IMP: 85-15-212, MCA

REASON: ARM 36.14.404(1)(f) requires dam owners to inspect their dams annually. The annual operation and maintenance inspection requirement should be listed in ARM 36.14.407 for clarity and consistency. The department has required dam owners to conduct annual inspections and this amendment memorializes that long-standing practice. An annual operation and maintenance inspection is considered the current industry standard of care.

36.14.501 HIGH-HAZARD DAM DESIGN CRITERIA (1) through (3) remain the same.

~~(4) Except as otherwise specified in ARM 36.14.501 to 36.14.504, concrete dams must be designed and constructed in accordance with principles at least equivalent to United States bureau of reclamation Design of Small Dams to its specified limits, or Design of Gravity Dams and Design of Arch Dams.~~

~~(5) Except as otherwise specified in ARM 36.14.501 to 36.14.504, earth dams retaining a flood water capacity of less than 12,500 acre-feet or a total capacity of less than 25,000 acre-feet measured to the primary emergency spillway must be designed and constructed in accordance with principles at least equivalent to United States soil conservation service TR-60, Earth Dams and Reservoirs. In this paragraph, total capacity means the total volume of space available for water and sediment upstream from a dam below the elevation at which discharge begins in the primary emergency spillway. In this paragraph, floodwater detention capacity is the capacity between the crest of the principal spillway and the elevation at which discharge begins in the primary emergency spillway sediment.~~

~~(6) Except as otherwise specified in ARM 36.14.501 to 36.14.504, earth dams greater than the limits specified in (5) must be designed and constructed at least equivalent to the United States bureau of reclamation Design of Small Dams to its limit of a 50-foot dam height, and to the corps standard beyond a 50-foot dam height.~~

AUTH: 85-15-110, MCA

IMP: 85-15-210, MCA

REASON: This amendment is reasonably necessary to remove references in the rule that are outdated. The amendment provides the engineer flexibility to determine the design standard most applicable to the situation, in consultation with the department. The department has the opportunity to review the engineer's decision-making during the standard construction permit review process described in ARM 36.14.303.

36.14.601 PERIODIC OWNER INSPECTIONS FIVE-YEAR DAM EVALUATION - GENERAL REQUIREMENTS (1) The owner of a high-hazard dam shall have ~~periodic inspections~~ a five-year dam evaluation conducted by a qualified engineer.

(2) ~~Periodic inspections~~ A visual inspection of the dam must be ~~made~~ conducted and a report completed on a frequency of at least once every ~~5~~ five years or within the period stated in the terms of an operation permit for a high-hazard dam. The visual inspection may be split into two separate visits to the dam site, if the first visit to the dam site does not exceed the inspection frequency set forth in the approved operation permit.

(3) The frequency of ~~periodic~~ the five-year dam evaluation inspections shall be set by the department after considerations including the condition of the dam, proximity to population centers, current design technology, and type of construction.

(4) remains the same.

~~(5) Within 90 days of the periodic inspection, the owner shall deliver a copy of the report to the department, together with a statement of the owner's intent in regard to any deficient or unsafe items identified by the report, and a time schedule to remedy the items. The original copy of the report shall be retained by the owner.~~

~~(6)~~(5) The owner shall bear the cost of the ~~inspection~~ five-year dam evaluation.

AUTH: 85-15-110, MCA

IMP: 85-15-213, MCA

REASON: This amendment is reasonably necessary to provide clarity in the following manner:

The term "periodic owner inspection" is confusing since the inspection must be completed by a qualified engineer and not the owner. The periodic owner inspection must contain both a visual inspection and a safety evaluation of dam performance. The amendment better reflects the contents of ARM 36.14.602 and 36.14.603 and is consistent with long-standing department requirements.

Reference to the engineer's report was confusing and out of place.

Dam owners have frequently commented on the need to split the visual inspection into two separate visits to the dam site to better coordinate with reservoir operation. This amendment will allow dam owners flexibility to conduct part of the visual inspection in the spring, when the reservoir is full, and part of the inspection in the fall, when the spillways are dewatered.

Dam owners have long been required to provide a statement of their intent to follow engineers' report recommendations before the operation permit application is considered complete. It is more logical to have this requirement in ARM 36.14.402.

In addition, with virtually all reports being distributed electronically, a need no longer exists to require retention of the original copy of the report.

36.14.602 PERIODIC OWNER INSPECTIONS FIVE-YEAR DAM EVALUATION – VISUAL INSPECTION AND SAFETY EVALUATION ITEMS

(1) The visual inspection and safety evaluation must include, but not be limited to:

(a) review and analysis of previous visual inspection and safety evaluation reports and available data on the design, construction, operation, and maintenance of the dam and its appurtenances;

(b) through (j) remain the same.

AUTH: 85-15-110, MCA

IMP: 85-15-213, MCA

REASON: This amendment clarifies terminology that has been a source of confusion. The amendment also makes consistent terminology changes in other proposed rule amendments, better reflecting the contents of ARM 36.14.602 and 36.14.603 and long-standing department practice.

36.14.603 ENGINEER'S REPORT OF PERIODIC INSPECTION FIVE-YEAR DAM EVALUATION (1) remains the same.

(2) The engineer shall deliver the report and discuss it with the owner within 60 days of the ~~investigation~~ visual inspection. If the owner decides to split the visual inspection into two separate visits pursuant to ARM 36.14.601(2), the 60-day report delivery requirement begins with the date of the second visual inspection.

AUTH: 85-15-110, MCA

IMP: 85-15-213, MCA

REASON: This amendment clarifies terminology and makes consistent terminology from other proposed rule amendments. If a dam owner splits the visual inspection into two visits pursuant to ARM 36.14.601, the report delivery requirement that is based on the second visual inspection is needed to ensure the report addresses findings from both visits.

4. The department proposes to repeal the following rule:

36.14.311 RELEASE OF THE PERFORMANCE BOND

AUTH: 85-15-110, 85-15-211, MCA

IMP: 85-15-210, MCA

REASON: This rule is being repealed because the proposed amendment to ARM 36.14.309(1)(b) eliminates the performance bonding requirement.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted in writing to: Martin Balukas, Department of Natural Resources and Conservation, 1539 Eleventh Avenue, P.O. Box 201601, Helena, MT 59620-1601, or e-mail at MBalukas@mt.gov, and must be received no later than 5:00 p.m. on August 9, 2022.

6. Martin Balukas, Department of Natural Resources and Conservation, has been designated to preside over and conduct this hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 2 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sosmt.gov/ARM/Register>.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment and repeal of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Amanda Kaster
AMANDA KASTER
Director
Natural Resources and Conservation

/s/ Joslyn Hunt
JOSLYN HUNT
Rule Reviewer

Certified to the Secretary of State on June 28, 2022.