

CHAPTER 46-7

STORAGE, DIVERSION AND IRRIGATION WORKS

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46-7-1. Excess capacity of works--Availability for beneficial use. The owner of any works for storage, diversion, or carriage of water which have a capacity in excess of the needs of the owner for lawful application of water to beneficial use may be required to make the excess capacity available, at reasonable rates, to any person entitled to use water for beneficial purposes. However, the excess capacity need not be made available if the use of the excess capacity would unreasonably damage existing works or require substantial modification of the works. Upon petition, the Water Management Board may determine if excess capacity can be used without unreasonable damage to existing works or without requiring substantial modification of the works. If the board's findings are positive, it may establish reasonable rates and may set the compensation to be paid to the owner for damage to existing works. This section does not obligate any person to continue operation of any works.

Source: SDC 1939, § 61.0136; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0121; SL 1983, ch 314, § 115.

46-7-2. Headgates or other measuring devices required. Any appropriator may be required to construct and maintain a substantial headgate or other means of measurement at the point of diversion or at any other point or points as required by the Water Management Board and shall construct or install a measuring device of a design approved by the board at the most practical point or points for measuring and apportioning the water as approved in the permit or license or as determined by the board. The board may order the construction or installation of a measuring device by an appropriator and, if it is not completed within twenty days thereafter, the board may refuse to allow diversion by the appropriator. Devices not of a stationary nature shall be so arranged that they can be locked in place.

Source: SDC 1939, § 61.0143; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0130; SL 1978, ch 324; SL 1983, ch 314, § 116.

46-7-3. Repair of works required--Rules. The owner of any works for the storage, diversion or carriage of water or for the application of water to beneficial use, including wells, shall keep the works in good repair at all times to ensure safety of the works and to prevent waste of water. The water management board may promulgate rules pursuant to chapter 1-26 to establish minimum safety standards for the design, construction, alteration, maintenance and repair of works. For the purpose of making repairs, the owner may enter upon the lands where the works are located, taking care to avoid unnecessary damage, and shall pay the owner of the lands for any actual damage which is caused.

Source: SDC 1939, § 61.0426; SL 1955, ch 431, § 1; SL 1983, ch 314, § 117; SL 1987, ch 328, § 1.

46-7-4. Repealed by SL 1983, ch 314, § 118

46-7-5. Inspection of works by chief engineer--Order for repair of unsafe works--Repair by chief engineer--Costs--Filing of written protest--Hearing--Liability of chief engineer and state. The chief engineer may inspect any works described in § 46-7-3, including abandoned works, to determine whether the works are safe. If works are found to be unsafe, the chief engineer shall notify the owner and shall order the owner to make changes necessary to secure the safety of the works, allowing a reasonable time, not to exceed six months, for putting the works in a safe condition. The order may specify that if the owner fails to make the repairs in the time allowed, the chief engineer may enter the property and put the works in a safe condition. Any costs incurred shall be borne by the owner in accordance with § 46-7-5.1. The owner may contest the order of the chief engineer by filing a protest in writing with the chief engineer within twenty days of the service of the order upon the owner. Upon receiving the protest, the chief engineer shall schedule the matter for hearing with the board in accordance with the provisions of chapter 46-2A. The filing of the written protest suspends the operation of the chief engineer's order until further action by the board. The board may affirm, modify, or reverse the order of the chief engineer. No owner of unsafe works as determined by the chief engineer or, after a protest and hearing, by the board may fail or refuse to make changes necessary to secure the works' safety pursuant to the order. The chief engineer, the state, or its employees do not incur any liability, either sovereign or personal, as a result of the duties imposed by this section or other provisions related to the inspection and repair, maintenance, or alteration of works or the notification to owners of unsafe conditions.

Source: SDC 1939, § 61.0130; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0118; SL 1983, ch 314, § 119; SL 1987, ch 328, § 1A; SL 2011, ch 165, § 279.

46-7-5.1. Repair of unsafe works by chief engineer--Cost as lien against property--Bidding provisions. Upon failure or refusal of an owner of unsafe works to make the changes necessary to secure the safety of the works pursuant to the chief engineer's order or order of the board, the chief engineer may enter upon the property where the works are located and make the necessary changes. The cost of the work shall be borne by the owner of the works and may be recorded as a lien against any property of the owner until paid. This section does not limit any other remedy against the owner of the works. The chief engineer shall comply with the bidding provisions of chapters 5-18A and 5-18B unless the chief engineer determines that compliance with those provisions will result in harm to public health or property.

Source: SL 1983, ch 314, § 121; SL 1987, ch 328, § 1B; SL 2011, ch 2, § 145; SL 2011, ch 165, § 280.

46-7-5.2. Breach or repair of works by chief engineer to protect human life--Cost as lien against property--Other remedies. Notwithstanding the pendency of any notice, order, or protest pursuant to § 46-7-5, the chief engineer may immediately breach or repair any works if, in the chief engineer's judgment, it is necessary to protect human life from imminent danger. The cost of the work in such cases shall be borne by the owner of the works and may be recorded as a lien against any property of the owner until paid. The provisions of chapters 5-

18A and 5-18B are not applicable to this section. This section does not limit any other remedy against the owner of the works.

Source: SL 1987, ch 328, § 1C; SL 2011, ch 2, § 146.

46-7-5.3. Investigation of dam--Variance relating to minimum spillway design requirements--Hearing. Upon petition to the board by the owner of a dam, the chief engineer may investigate and conduct the necessary analysis to determine the potential for damage to downstream residents or property if a dam were to fail due to inadequate spillway capacity. After the investigation and analysis, the chief engineer may recommend that a variance to board rules relating to minimum spillway design requirements for dams be granted or denied. The recommendation, notice, and hearing before the board shall be conducted pursuant to the procedure contained in chapter 46-2A. Following the hearing, the board may grant a variance upon a finding that failure of the dam due to inadequate spillway capacity will not increase the potential for damage from flooding to downstream residents or property.

Source: SL 1987, ch 328, § 1D.

46-7-5.4. Definition of terms. Terms used in §§ 46-7-5.5 to 46-7-5.11, inclusive, mean:

- (1) "Affidavit," a written declaration under oath, made on personal knowledge, subscribed and dated by the owner in the presence of a notary public;
- (2) "Flood plain," an area below the dam that has been or may be covered with water from natural runoff or from any failure of the dam;
- (3) "High-hazard dam," a dam whose failure may cause loss of life; and
- (4) "Immediate family," the owner, the owner's spouse, and their minor children.

Source: SL 1990, ch 357, § 1.

46-7-5.5. Application to dams constructed before January 1, 1990--Owner and family sole residents--Determination of flood plain. The provisions of §§ 46-7-5.4 to 46-7-5.11, inclusive, only apply to privately owned high-hazard dams constructed before January 1, 1990, if the owner and the owner's immediate family are the only persons residing below the dam within the flood plain. The chief engineer shall determine the flood plain.

Source: SL 1990, ch 357, § 3; SL 2011, ch 165, § 281.

46-7-5.6. Owner's reporting requirements where nonowner establishes habitation within flood plain. If any individual other than the owner of a high-hazard dam establishes a habitation within the flood plain, the owner shall report the name, address and location of the individual to the chief engineer within ten days.

Source: SL 1990, ch 357, § 4.

46-7-5.7. Privately owned high-hazard dam--Where chief engineer and state not obligated to secure safety thereof--Owner's affidavit upon refusal to correct unsafe condition. Notwithstanding the provisions of §§ 46-2-9, 46-2-17, 46-7-3, 46-7-5, 46-7-5.1, 46-7-5.2, and 46-7-5.3, the chief engineer and all officers, employees, and agents of the State of South Dakota are under no obligation to secure the safety of, or take any further action with regard to, a privately owned high-hazard dam if the owner of the dam:

- (1) Refuses to correct an unsafe condition identified by order of the chief engineer pursuant to § 46-7-5; and
- (2) Executes an affidavit, which is accepted for filing by the Water Management Board.

Source: SL 1990, ch 357, § 2.

46-7-5.8. Requirements as to form and content of owner's affidavit. The owner's affidavit referred to in § 46-7-5.7 shall:

- (1) Be in a form prescribed and approved by the board;
- (2) Identify and describe the dam in question;
- (3) State the construction date of the dam;
- (4) Acknowledge that the owner is aware that the unsafe condition exists;
- (5) State that the owner refuses to correct the unsafe condition;
- (6) Include a description of the flood plain as determined by the chief engineer;
- (7) State that no one other than the owner and the owner's immediate family reside within the flood plain;

(8) Include the owner's express assumption of all liability for any claim, injury, or damage resulting from failure of the dam, specifically holding the state, the board, the department, the chief engineer, and all officers, agents, or employees of the state harmless from any liability and damages for claims, injuries, damages, and costs, including attorney's fees resulting from failure of the dam;

(9) Acknowledge that the owner is aware that the provisions of §§ 46-7-5.4 to 46-7-5.11, inclusive, only apply to privately owned high-hazard dams constructed before January 1, 1990, if the owner and the owner's immediate family are the only persons residing below the dam within the flood plain; and

(10) State that if any individual other than the owner establishes a habitation within the flood plain, the owner will report the name, address, and location of the individual to the chief engineer within ten days.

Source: SL 1990, ch 357, § 5; SL 2011, ch 165, § 282.

46-7-5.9. Board's acceptance of owner's affidavit--Conditions. The board, based on the specific facts of each case, may impose reasonable conditions upon the acceptance of the owner's affidavit for filing if those conditions are related to the promotion of the health, safety, and welfare of any minor children, third persons, or the general public. The board shall refuse to accept any owner's affidavit for filing unless the board is satisfied that:

- (1) The owner has complied with the terms of §§ 46-7-5.4 to 46-7-5.11, inclusive;
- (2) The dam in question is a privately owned high-hazard dam, constructed prior to January 1, 1990;

and

- (3) The owner and his immediate family are the only persons residing within the flood plain.

Source: SL 1990, ch 357, § 6.

46-7-5.10. Recording requirements as to owner's affidavit. An affidavit accepted for filing by the board, together with any conditions set by the board, shall be recorded by the owner in the office of the register of deeds in any county where the dam or flood plain are located.

Source: SL 1990, ch 357, § 7.

46-7-5.11. Where privately owned high-hazard dam is subject to action by chief engineer and state. The provisions of § 46-7-5 shall take effect notwithstanding § 46-7-5.7, if:

- (1) The owner fails to comply with §§ 46-7-5.4 to 46-7-5.11, inclusive;
- (2) The owner violates any of the conditions set by the board pursuant to § 46-7-5.9; or
- (3) There has been a change of conditions which takes the dam out of the operation of §§ 46-7-5.4 to 46-7-5.11, inclusive.

In addition, the board will cancel the filing and no further affidavits may be filed for the dam.

Source: SL 1990, ch 357, § 8.

46-7-6. Repealed by SL 1983, ch 314, § 120

46-7-7 to 46-7-11. Repealed by SL 1983, ch 314, §§ 122 to 126

46-7-12. Willful damage, destruction, or interference with works prohibited. No person, for any purposes other than those contemplated by this title, may willfully damage, destroy, or otherwise interfere with any works for the application of water to beneficial use, for the apportionment or measurement of water or for any hydrographic study, nor may any person interfere with any person engaged in the discharge of any duties connected therewith.

Source: SDC 1939, § 61.9912; SL 1981, ch 316, § 6; SL 1983, ch 314, § 127.

46-7-13. Repealed by SL 1983, ch 314, § 128

46-7-14. Unauthorized injury to or interference with pier, boom, or dam prohibited. No person may, without authority of law, interfere with any pier, boom, or dam lawfully erected or maintained upon any waters within this state, hoist any gate of a dam, whether in or about the dam, damage or destroy any dam or any embankment necessary for support of the dam or maliciously make or cause to be made any aperture or cut in the dam or embankment with intent to damage or destroy it.

Source: SDC 1939, § 13.4506; SL 1981, ch 316, § 8; SL 1983, ch 314, § 129.

46-7-15. Removal or injury of piles prohibited. No person may maliciously draw up, remove, cut, or otherwise injure any piles fixed in the ground and used for securing any bank or dam of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, dock, quay, jetty, or lock.

Source: SDC 1939, § 13.4507; SL 1983, ch 314, § 130.
