

New York State Department of Environmental Conservation
Division of Fish, Wildlife and Marine Resources




John P. Cahill,
Commissioner

M E M O R A N D U M

September 30, 1997

TO: Regional Supervisors of Natural Resources

FROM: Gerald A. Barnhart 

RE: Permit Requirements Guidelines for Breach and Removal of Nuisance Beaver Dams

Over the past several years there's been a great deal of discussion about the need for Article 15 and 24 permits when staff issue Article 11 permits to breach or remove nuisance beaver dams. In 1993, a General Permit covering Articles 11, 15 and 24 was issued to help staff offer quick permitting service to landowners affected by nuisance beaver dams. After closer scrutiny, we've determined that Article 15 applies in almost every case involving the breach and removal of beaver dams.

Therefore, the General Permit must be issued in all cases with the exception of:

- 1) **longstanding dams**, greater than 2 years old, where an individual Article 15 and/or Article 24 permit is required, or
- 2) when work is by **state agencies or by local governments with a DEC Article 15 "Memorandum of Understanding"**, where NO permit is required in Article 15 waters, in wetlands not regulated by DEC, or for Article 24-exempt activities in regulated wetlands.

I've attached a copy of the final guidelines for nuisance beaver dam permitting. Please distribute to appropriate staff for their use.

Enclosure

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PERMITTING GUIDELINES for BREACH or REMOVAL of NUISANCE BEAVER DAMS REGULATED under ARTICLES 15 & 24

INTRODUCTION

Beaver populations have increased dramatically in recent years. With this increase, DEC staff members who handle nuisance beaver complaints often face the question of when a landowner's activities require ECL Article 15 and 24 permits. Issuance of these permits helps to protect and conserve the functions and benefits of the state's stream and wetlands resources. Permits also protect the interests of Department staff, the regulated landowner and other landowners both up- and downstream of beaver activities. The following guidance is offered to help Beaver Program staff with the interpretation of law, regulation and policy surrounding Article 15 and 24 as it applies to the removal or breaching of beaver dams.

ARTICLE 15 APPLICABILITY

Protected Streams

A "protected stream" is defined as any stream or portion of a stream that the Department sets a classification or standard of C(T) or higher [including C(TS), B, B(T or TS), A, A(T or TS), AA, or AA(T or TS)]. Classes and standards for fresh surface waters of the state can be found in 6 NYCRR Parts 800 - 941. Most regional offices have mylar overlays for USGS quadrangle maps and marked up copies of NYSDOT base maps which show the "water index numbers" and classifications of streams. Regional Division of Compliance Services and/or Bureau of Fisheries offices maintain these maps and can help with stream classifications for your region.

Navigable Waters

A "navigable water" is defined in 6 NYCRR Part 608 as "any lake, river, stream or other water body which is navigable in fact or upon which a vessel holding one or more people can be operated..." The definition further states that even if there are interruptions to navigability caused by artificial structures, shallows, rapids or other obstructions (e.g. beaver dams), or by seasonal variations in stream flow the water is still navigable. Waterbodies that are surrounded by land held in single private ownership at every point in their total area are excluded from the definition of navigable waters.

AGENCIES EXEMPTED FROM ARTICLE 15 PERMITTING REQUIREMENTS

All state agencies are categorically exempted from Article 15 permitting requirements. However, NYSDOT conducts Article 15 work pursuant to a 1997 MOU with DEC. The MOU outlines DEC's review and oversight role for DOT projects although no actual permit is issued. Local public corporations also can be exempted from Article 15 permitting requirements as long as there is a written agreement ("Memorandum of Understanding" or MOU) with NYSDEC and their proposed actions meet the standards of

conduct contained in 6 NYCRR Part 608¹. The regional Division of Environmental Permits offices maintains copies of the DOT MOU and other local MOUs for Article 15 work in your region.

ACTIVITIES THAT REQUIRE ARTICLE 15 PERMITS

A landowner must obtain an Article 15 permit to: 1) disturb the bed or banks of a protected stream (§15-0501), 2) excavate from or place fill in a navigable water by any means (§15-0505), or 3) to excavate from or place fill in any fresh marshes, estuaries, tidal marshes and wetlands inundated at mean high-water level and adjacent to any navigable water of the State (§15-0505). "Disturbance of protected streams" includes the removal of sand, gravel or other material (6 NYCRR Part 608.2) and "fill" is defined as, among other things, organic materials, which includes sticks, stumps and similar materials. Therefore, the disturbance of a beaver dam in the bed or on the banks of a protected stream or the excavation of a dam from the bed of a navigable waterbody requires an Article 15 permit. All landowners, including farmers, local municipalities (except those working under an MOU), utilities and public authorities (with the exception of the Power Authority) need to obtain a permit to conduct Article 15 regulated activities.

For all landowners, except Article 15-exempt agencies, an Article 15 permit is required to remove or breach, by hand or with machinery, a beaver dam located in any waterbody including in beaver impoundments.

ARTICLE 24 APPLICABILITY

If a state agency or a local government with an Article 15 MOU with DEC must also conduct the breach or removal of a beaver dam in or near freshwater wetlands an Article 24 permit may be required. DEC-regulated freshwater wetlands are mapped² on NYSDOT quadrangle maps at a scale of 1" = 2000'. These maps are available in the regional DEC offices and at local government offices.

If disturbance of a beaver dam is proposed on an unmapped wetland or upland area,

¹Article 15 permit issuance standards include the following: "(a) the proposal is reasonable and necessary, (b) the proposal will not endanger the health, safety or welfare of the people of the State, and [Ⓞ] the proposal will not cause unreasonable, uncontrolled or unnecessary damage to natural resources including soil, water, fish, shellfish, crustaceans and aquatic and land-related environment."

² A New York State wetland is mapped and regulated because it is either 12.4 acres or greater in size or is a wetland of "Unusual Local Importance" (ULI) due to certain beneficial characteristics (e.g. endangered species inhabited site) or due to expressed local interest in protecting the wetland.

then no Article 24 permit is required. If a subsequent field inspection of the site reveals a wetland that is potentially of jurisdictional size (12.4 acres or larger), report this finding to the Regional Environmental Protection or Wildlife Manager for further investigation and possible amendment of the map. If the wetland is not mapped at the time of the request to breach or remove the beaver dam, then an Article 24 permit is not required (until such time as staff initiates the map amendment process for that area).

An Article 24 permit is required by Article 15-exempt agencies for the breach or removal of a beaver dam if the dam is located in or within 100 feet of a NYSDEC-mapped regulated wetland. Certain activities are exempt from permitting procedural requirements.

As noted, some activities are exempted from Article 24 permit requirements. For other non-exempt Article 24 activities, an Article 15-exempt agency is required to request and be granted an Article 24 permit prior to dam breach or removal. The following section outlines the activities that are exempt from Article 24 permitting requirements.

ACTIVITIES EXEMPTED UNDER ARTICLE 24

6 NYCRR Part 663.4 (d) 10 specifically exempts the "ordinary maintenance and repair of existing functional structures, facilities and improved areas." Structures such as culverts, water level control devices, and drainage ditches are all designed to move water from one place to another. These structures are prime targets for beaver damming activities.

A **culvert pipe** plugged by materials placed by beaver can become severely impaired or completely non-functional. Diminished function of a culvert may jeopardize the integrity of a road, railroad bed or other structure. Severe structural damage from flooding, undermining and breaching can occur quickly as a result of a plugged culvert. **Water level control structures** such as spillways, drop boxes and standpipes also are frequently used as dam sites. The impoundments associated with these structures can be flooded out. Flooding can cause a breach or complete washout of a dike. Beaver activities can also impair **drainage ditches**. Impairment and loss of function can cause flooding of roads and other lands.

Removal of beaver debris materials to clean and/or maintain an existing functional culvert pipe, water level control structure, or drainage ditch are activities exempted from Article 24 permitting procedural requirements.

Most Article 15-exempt agencies do not normally conduct agricultural activities, although, these agencies might be asked to conduct work to help relieve flooding on agricultural land. Agricultural activities are specifically exempted from Article 24 permitting requirements as noted in ECL 24-0701.4 and 6 NYCRR Part 663.4 (d) 9. Many farming activities are excluded from regulation, including **draining land or wetlands for growing**

agricultural products. "Agricultural products" is defined in Article 24 as crops, vegetables, fruits, or flowers. We consult Agriculture and Markets Law (e.g. §301.2 of Article 25AA) for those items considered farming products. These products are field crops, fruits, vegetables, horticultural specialties, livestock and livestock products, maple sap, Christmas trees, and aquaculture products. **These definitions purposely exclude commercial timber lands and products which are not considered agricultural production under NYS Environmental Conservation Law or Agriculture & Markets law.**

Breach or removal of a beaver dam in a regulated wetland to drain agricultural land (which does not include commercial timber land) for the purpose of growing agricultural products are activities exempted from permitting procedural requirements. Therefore no Article 24 permit is required in this case.

ACTIVITIES THAT REQUIRE ARTICLE 24 PERMITS

An Article 15-exempt agency must obtain an Article 24 permit to drain and alter water levels (except as part of an exempted agricultural activity) [6 NYCRR Part 663.4 (d) 17] and to remove or breach a beaver dam [Part 663.4 (d) 18] in a regulated wetland or its 100-foot adjacent area.

PERMIT TYPES AND THEIR APPLICABILITY

The following sections outline the types of Article 15/24 permits available to the regulated public and agencies.

General Permit

In March 1993, the Division of Environmental Permits issued a statewide general permit (GP), in accordance with the Uniform Procedures Act (UPA), for breach or removal of beaver dams in Article 15 protected waters and Article 24 wetlands. This GP form also covers the Article 11 permit (not subject to UPA requirements) for disturbance of a beaver dam and to take nuisance beaver. Any landowner is eligible for the GP if the nuisance beaver dam is new (generally less than 2 years old) or a recent addition to a longstanding dam. DEC staff can issue the GP in the field after a site evaluation. Staff can also evaluate a continuing nuisance beaver problem over the phone, then reissue the GP through the mail after at least one on-site visit has been conducted. With a GP authorization, landowners may restore water levels to their previous conditions to promptly address urgent or imminent property damage or safety situations.

Residential, commercial, and public structures and facilities may become impaired or non-functional due to flooding from recent nuisance beaver activities. Examples of such structures include roads, houses, outbuildings, garages, wells, septic systems, lawns, driveways, etc. Staff can issue the GP to a landowner to lower a beaver dam to drain the area around the structure and to return waters to their previous levels.

Staff can issue the General Permit for the breach or removal of a recent nuisance beaver dam in a protected stream, navigable waterbody or regulated freshwater wetland. The GP is issued to landowners for work necessary to relieve new flooding of structures or property. Breach and removal of nuisance beaver dams to relieve beaver-induced flooding on commercial timberland is eligible for the GP.

Emergency Authorizations

In 6 NYCRR Part 621.12 of the Uniform Procedures Act, the Department allows for projects carried out in response to an emergency situation. An "emergency" is defined as an event which presents an immediate threat to life, health, property, or natural resources. For an emergency project, the normal application procedural requirements are waived. Part 621 provides for **immediate action by a state or local government agency** under appropriate circumstances and where prior notification is not possible. For example, an agency may choose to proceed immediately with emergency work due to immediate public safety concerns resulting from rapid beaver-induced flooding. In this case, the agency may breach or remove the beaver dam without prior approvals from DEC. The agency undertaking the work must still act in an environmentally conscientious manner (*ie.* lowering the dam gradually, disposing of excavated materials appropriately, etc.). The agency must then notify the Regional Permit Administrator within 24 hours (or as soon as practicable) after commencement of the project. The Department must then decide either to grant an emergency authorization if warranted or to issue an order suspending the action if no emergency exists. For a private landowner, Part 621 requires notification of the Regional Permit Administrator in writing prior to conducting emergency work. The landowner must submit a description of the project, a location map and project plan, and explanation of the specific emergency. The department then has two business days to issue a decision granting or denying the emergency authorization. An emergency authorization can be sought for an extremely urgent flooding situation where the landowner is unable to wait for issuance of the GP by field staff. Some regional offices, such as Region 5, have authorized certain staff to issue emergency authorizations on the spot, within certain guidelines, for their particular program areas.

Staff should direct questions regarding any emergency authorization to the Division of Environmental Permits Regional Permit Administrator.

Individual Permits

A longstanding beaver dam (usually more than 2 years old) often can be identified by the remnants of dead non-wetland vegetation (particularly upland trees and shrubs) found in the beaver impoundment. The vegetation dies because of persistent flooding conditions over a sufficiently long period [see freshwater wetland definition §24-0107 (1)(b)]. A longstanding dam may also impound water in areas that do not contain woody vegetation. In these cases, wetland vegetation such as cattails, rushes, or purple loosestrife, may become

thickly established along the shoreline of the impoundment.

If a landowner does not qualify for the GP or an emergency authorization then an individual permit is required before he or she may commence with the breach or removal of a beaver dam. Refer the landowner to your regional wetlands program staff or Division of Compliance Services office for guidance with procedures and an application for an individual permit.

To breach or remove a longstanding beaver dam (greater than two years old), where there is no new or recent property damage problem, an private landowner must apply for and be granted an individual Article 15/24 permit before work may commence.

Standard Activity Permits

Large landowners, such as timber companies, are prime candidates for long term Article 15/24 permits to breach and remove nuisance beaver dams on their properties. This type of permit allows Department staff to review the site conditions and proposed work for a specific geographic area such as a particular timber parcel. Public review of the proposed action, as required by the State Environmental Review Quality Act (SEQRA), is done only once. After the permit is issued, the permittee may conduct work pursuant to the permit, as often as needed, until the permit expires. These permits can be made valid for up to 5 years or more depending on the circumstances.

OTHER AGENCIES REGULATING DISTURBANCE TO BEAVER DAMS

Adirondack Park Agency

The Adirondack Park Agency (APA) has Article 24 regulatory responsibilities within the Park boundaries, including regulation of wetlands smaller than 12.4 acres. Contact Ken Kogut, Region 5 BEP Manager, or Robert Inslerman, Region 5 Wildlife Manager, for further information on coordination of DEC Articles 15 and 11 permits and APA Article 24 permits for breach and removal of beaver dams within the Adirondack Park.

Army Corps of Engineers

The United States Army Corps of Engineers (Corps) regulates certain dredging, excavation and filling activities in the waters of the U. S. pursuant to Section 404 of the Clean Water Act. According to Corps policy, if a beaver dam is 2 years old or less, no 404 permit is required to breach or remove the dam. If the dam is more than 2 years old, a 404 permit may be required depending on the circumstances. Corps field staff are directed by their regulations to determine whether an activity in a wetland is likely to destroy or degrade that wetland. If the Corps staff determines that this is unlikely, then no permit is required.

CONCLUSION

This document offers guidance to staff on the applicability of Articles 15 and 24 in relation to breach and removal of beaver dams. It also outlines the types of permits available to landowners who want to breach or remove nuisance beaver dams in areas regulated by the Department. The General Permit implemented in March 1993 is a quick and easy way for staff to authorize work on nuisance beaver dams. This on-the-spot permit allows the landowner to quickly relieve recent flooding caused by a new beaver dam.

QUICK FIELD KEY for ISSUING the GENERAL PERMIT for BREACH OR REMOVAL OF A NUISANCE BEAVER DAM . . .

On any waterbody or DEC-regulated freshwater wetland. . .

ISSUE THE GENERAL PERMIT, which covers Articles 11, 15 & 24, **TO ANY LANDOWNER** eligible for an Article 11 permit:

EXCEPT When Breach or Removal is:

A) On a **longstanding beaver dam** (greater than 2 years old), when conducted by a **private landowner**, which **needs authorization by an individual Article 15/24 permit**. Refer landowner to the regional wetlands program staff or regional Division of Environmental Permits for information on how to proceed with an individual permit;

- OR -

B) On **any beaver dam**, when conducted by **any state agencies and certain local governments, working under a DEC Article 15 “Memorandum of Understanding”**, in the following circumstances where **no DEC permit is required**:

- 1) in any Article 15 waterbody,
- 2) in wetlands not regulated by DEC, or
- 3) for Article 24-exempted activities* in DEC-regulated wetlands.

* Article 24-exempted activities include: a) **CLEANING** out beaver debris materials from within **FUNCTIONAL STRUCTURES** such as **Culvert Pipes, Water Level Control Structures and Drainage Ditches**; and b) **BREACHING OR REMOVING A BEAVER DAM** for the purpose of draining land or wetlands (except for commercial timberlands) **TO GROW AGRICULTURAL PRODUCTS**.

EMERGENCY WORK!!! where life, health, property, or natural resources are in imminent jeopardy, and the landowner can't wait for a General Permit:

- A) **State or local government agencies may take immediate action** - with notification to the Regional Permit Administrator as soon as practicable.
- B) **Individual landowners must request authorization from the Regional Permit Administrator** prior to work. The Regional Permit Administrator has two days to issue or deny the emergency authorization.