State of West Virginia

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August 21, 2025

The Honorable Kent A. Leonhardt
Commissioner of Agriculture
Chairman, West Virginia State Conservation Committee
1900 Kanawha Blvd. E, Bldg. 1, Rm 28E
Charleston, WV 25305

Dear Commissioner Leonhardt:

Your office has asked for an Opinion of the Attorney General about the effects of Senate Bill 941, enacted during the 2025 Regular Legislative Session, on the powers, duties, and liabilities of conservation district supervisors. We are issuing this opinion under West Virginia Code § 5-3-1, which provides that the Attorney General "shall give written opinions and advice on questions of law … whenever required to do so, in writing, by … the commissioner of agriculture." When this Opinion relies on facts, it depends solely on the factual assertions in your correspondence with our office.

According to your letter, since the 1930s, Congress has charged the U.S. Department of Agriculture with developing plans to reduce flooding in selected watersheds. As part of that work, Congress gave the Natural Resources Conservation Service (NRCS) the authority to begin building small watershed flood control dams and channels across the United States. NRCS requires sponsors of these to be a city, county or state agency, a conservation district, or tribal government.

In West Virginia, conservation district supervisors sponsor 170 such flood control dam structures and 22 channels within their respective districts. Each time one of these projects was begun, NRCS and the local conservation districts agreed to an Operation and Maintenance ("O&M") plan before construction started. These agreements require the parties to ensure the structures will continue to operate as designed. And under these agreements, project sponsors (like conservation district supervisors) are typically responsible for routine operation and maintenance, repairs, or rehabilitation.

During the 2025 Regular Session, the Legislature passed—and the Governor signed—Senate Bill 941. This bill "clarifi[ed] certain authority regarding dams owned or sponsored by local conservation districts; provid[ed] that any alteration, improvement, or agreement related to a dam owned or sponsored by a local conservation district is subject solely to the authority of the Department of Environmental Protection; and provid[ed] that the[se] provisions … [were] not [to] be construed to affect or alter any state or federal funding to the West Virginia Conservation Agency." S.B. 941, 87th Leg. Reg. Sess. (W. Va. 2025).

With these facts in mind, your letter raises the following questions:

1. *What effect, if any, does SB941 have on the O&M Agreements that the conservation district supervisors are currently party to as sponsors?*

2. *What is the scope of the conservation districts' role as sponsors in existing and future sponsorship of projects that involve contracting for construction, repair, or rehabilitation of the dams?*

3. *Will the O&M Agreements currently in force with the NRCS remain in effect?*

4. *What liability, if any, do conservation districts risk in their capacity as sponsors if they cannot fulfill their obligations under existing and future contracts and agreements?*

5. *Will conservation districts continue to be liable if work performed pursuant to their contracts and agreements causes dams to fail?*

We conclude that Senate Bill 941 grants sole authority over alterations, improvements, and agreements related to dams to the Department of Environmental Protection. Thus, conservation district supervisors are now required to obtain DEP's approval before performing work constituting an "alteration, improvement, or agreement," even when tied to existing O&M agreements. Likewise, DEP approval is required before a conservation district may enter any future contract with the federal government for construction, repair, or rehabilitation of dams. Current O&M agreements with the NRCS remain in effect, but—again—dam-related work constituting "construction" or "alteration" requires DEP approval. Conservation districts that are party to contracts with NRCS are potentially liable if they fail to fulfill their obligations, but contractual liability depends on contractual terms. Conservation districts may have liability if work performed pursuant to their contracts and agreements causes dams to fail.

Discussion

Conservation districts are created by statute, W. VA. CODE § 19-21A-1, *et seq.*, to "work to recommend and implement programs and policies that improve soil health and water quality," W. VA. CODE § 19-21A-2(d). They are "subdivision[s] of th[e] state." *Id.* § 19-21A-3(5). And they are "creatures of statute." *Div. of Just. & Cmty. Servs. v. Fairmont State Univ.*, 242 W. Va. 489, 498, 836 S.E.2d 456, 465 (2019) (cleaned up). As "delegates of the Legislature," conservation districts "must find within the statute warrant for the exercise of any authority which they claim."

Id. As relevant here, conservation districts "carry out preventive and control measures and works of improvement within" their respective districts, including "engineering operations" and "water management operations and measures for the prevention of floodwater and sediment damages[.]" W. VA. CODE § 19-21A-8(3).

Effective April 2025, Senate Bill 941 amended conservation districts' powers related to dams. S.B. 941 provides that "any alteration, improvement, or agreement related to a dam owned or sponsored by a local conservation district is subject solely to the authority of the Department of Environmental Protection." W. VA. CODE § 19-21A-8(1). S.B. 941 is not to "be construed to affect or alter any state or federal funding to the West Virginia Conservation Agency." *Id.*

As we explained in a prior Opinion Letter, S.B. 941 is intended to provide DEP with broad authority over all dam-related alterations, improvements, or agreements. *See* W. Va. Op. Att'y Gen., Opinion Letter Regarding Oversight of Dams Owned or Sponsored by Conservation Districts (July 10, 2025), 2025 WL 2050201, at *2. And "by saying the Department of Environmental Protection was 'solely' responsible, [S.B. 941] left no room for anyone else to act—conservation districts included—unless the Department chooses to coordinate or otherwise *allow* such a role." *Id.* DEP's role is limited only where it would "affect" or "alter" federal funding.

Thus, the Department's permission or coordination is generally necessary for *all* dam-related work that constitutes an "alteration," "improvement," or "agreement," even where that work implicates federal agreements.

The federal agreements to which your letter refers stem from the federal Watershed Protection and Flood Prevention Act, which created a federal-state program for the purpose of "preserving, protecting, and improving the Nation's land and water resources and the quality of the environment." 16 U.S.C. § 1001. To carry out that purpose, the U.S. Secretary of Agriculture may "furnish financial and other assistance to local organizations," like West Virginia's conservation districts. *Id.* § 1003(a)(4). As part of this financial assistance, project "sponsors" must sign Operation and Maintenance (O&M) agreements with NRCS. *See* USDA National Operation & Maintenance Manual (NOMM), Part 500, available at https://tinyurl.com/y68bt3pd; *see also* NOMM, Part 500.20(B); 7 C.F.R. § 654.10 ("A duly authorized official of the sponsor(s) must execute an O&M agreement with NRCS prior to NRCS furnishing financial assistance.").

Among other things, these agreements—alongside federal regulations—require that project sponsors on non-federal land "are responsible for financing and performing without cost to the Federal Government, needed operation and maintenance (O&M) of project measures installed with Federal financial assistance." 7 C.F.R. § 654.11(a); *see also* NOMM, Part 500.21 (O&M agreements require disclosure of "[t]he sponsor(s) who will be responsible for inspecting, performing, and financing the O&M" for each project). Sponsors are required to "operate and maintain completed project measures in … [c]ompliance with applicable Federal, State, and local laws, regulations, and ordinances." 7 C.F.R. § 654.15(a). O&M agreements are "legally binding contract[s]." NOMM, Part 500.21.

Senate Bill 941 doesn't alter the terms of existing O&M agreements between conservation districts and the federal government. And while conservation districts' dam-related "alteration" or "improvement" work is subject to DEP approval, that new proviso doesn't end the conservation districts' O&M obligations. Rather, it requires DEP approval before conservation districts perform work on dams. That new allocation of *oversight* doesn't necessarily mean that DEP will take over all *work* under existing agreements. Nor does it require DEP to serve as the sponsor on all future agreements. But S.B. 941 gives DEP the sole authority to decide the roles and responsibilities of covered decisions pertaining to West Virginia dams.

We caution, however, that DEP would not appear to have authority to terminate or otherwise endanger the O&M agreement, its new authority notwithstanding. Recall that S.B. 941 should not be "construed to affect or alter any state or federal funding to the West Virginia Conservation Agency." W. VA. CODE § 19-21A-8(1). Early termination of O&M agreements could indeed affect that funding. Sponsors take "responsibility for O&M of" completed projects. 7 C.F.R. § 654.14(a). The O&M agreements say how long that responsibility lasts: It may continue through "(1) [t]he evaluated life of the project, or (2) the evaluated life of measures that are economically evaluated as a unit, or (3) the useful life of cost-shared measures that are for land conservation or land utilization." *Id.* And during and after the O&M responsibility timeframes, sponsors *must* "operate and maintain completed project measures in ... compliance with applicable Federal, State, and local laws, regulations, and ordinances." *Id.* § 654.15(a).

Non-compliance with O&M responsibility may lead the federal government to demand "reimbursement of all financial assistance provided by NRCS." NOMM, Part 500.21. Alternatively, NRCS may "notify authorities having appropriate jurisdiction, withhold further assistance to the project, require the sponsor(s) to reimburse the government for the NRCS share of the cost of the project, and/or pursue other action authorized by the O&M agreement or law." 7 C.F.R. § 654.20(b).

In short, if a conservation district is a sponsor and it fails to comply with an existing O&M agreement (whether at DEP's behest or otherwise), and the federal government identifies that failure,[1] then the federal government may hold conservation districts responsible in any of those ways or in any way described in the O&M agreement. But without a specific contract to review, we cannot identify *all* the potential forms of liability that conservation districts may face for non-compliance with a contract's terms.

Lastly, conservation districts could continue to be held liable if work performed on a covered dam goes awry. Conservation districts have the power "[t]o sue and be sued." W. VA. CODE § 19-21A-8(11). Senate Bill 941 doesn't change that. And "[i]n matters of negligence," for instance, "liability attaches to a wrongdoer ... because of a breach of duty which results in an injury to others." Syl. Pt. 3, *In re Flood Litigation*, 216 W. Va. 534, 607 S.E.2d 863 (2004).

[1] The NRCS has an officer, called a State Conservationist, "responsible for NRCS activities within a particular State." 7 C.F.R. § 654.2. The State Conservationist "investigate[s] alleged sponsor violations of the O&M agreement." *Id.* § 654.20(a). If a violation "has occurred that may prevent the project measure from functioning as intended" or that may "create a health or safety hazard, or prevent the accrual of project benefits," the State Conservationist provides written notice to the sponsor. *Id.* And if the sponsor fails to "comply with the O&M agreement or . . . take corrective action," then the NRCS can act. *Id.* § 654.20(b).

"[R]easonable measures" are required when "due care" is owed. *Id.* at 548, 607 S.E.2d at 877 (cleaned up). But the "question of reasonableness" is a "fact-specific inquiry demanded of a jury." *Id.* at 542, 607 S.E.2d at 871.

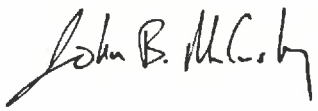
These general principles suggest that conservation districts may be held liable if their work causes dams to fail. That said, we can't speculate on the outcome of any fact-specific inquiry because we lack any facts to do so. And we also lack facts necessary to determine if any immunities that generally apply to political subdivisions would defeat liability. *See, e.g.,* W. VA. CODE § 29-12A-5(10) (providing for immunity from liability arising from "[i]nspection powers or functions, including failure to make an inspection, or making an inadequate inspection, of any property, real or personal, to determine whether the property complies with or violates any law or contains a hazard to health or safety"). Finally, we see nothing in S.B. 941 or any other law that would foreclose a potential indemnity claim by the conservation district.

Conclusion

We conclude that Senate Bill 941 grants sole authority over alterations, improvements, and agreements related to dams to the Department of Environmental Protection. So, conservation district supervisors are now required to obtain DEP approval of work to be performed under existing O&M agreements, at least where that work constitutes an "alteration," "improvement," or "agreement."

In future contracts with the federal government for construction, repair, or rehabilitation of dams, DEP approval is required before a conservation district may enter a contract. Current O&M agreements with the NRCS remain in effect, but dam-related work in one of the above categories requires DEP approval. Conservation districts that are party to contracts with NRCS are potentially liable to the federal government if they fail to fulfill their obligations, but the full scope of potential liability depends on contractual terms. Conservation districts may also be liable to third parties if they perform work that causes dams to fail.

Sincerely,



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