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RECOGNISED ENGINEERS CONFLICT OF INTEREST

Disclaimer – this is general commentary on the possible conflicts of interest a Recognised Engineer may face in carrying out their duties. It is not specific legal advice and should not be relied upon. You should seek advice from your own legal advisor.

The Building Act 2004 and the Building (Dam Safety) Regulations 2022 permit a Recognised Engineer to audit and/or certify the safety of their own work. However, there are reasons why this may not be appropriate. This is Engineering New Zealand's guidance to assist Recognised Engineers with this ethical issue.

Background

The Building (Dam Safety) Regulations 2022 will give operative effect to the post-construction dam safety provisions in the Building Act 2004. The Regulations come into force in May 2024. The Regulations establish the role of Recognised Engineers. This guidance relates to issues a Recognised Engineer may encounter in undertaking their role as it is set out in the Regulations.

A Recognised Engineer is a Chartered Professional Engineer who has been assessed by Engineering New Zealand, as the Registration Authority for Chartered Professional Engineers, as having the requisite qualifications and competencies to perform the role as set out in the Regulations. Recognised Engineers will have the role of auditing and certifying Potential Impact Classifications, Dam Safety Assurance Programmes, and annual Dam Compliance Certificates in accordance with the Regulations.

We sought and received legal advice about the legal liability that may arise for Recognised Engineers in early 2023. Our summary of that advice is available [on our website](#).

The definition of "financial interest" in section 149 of the Act allows for a Recognised Engineer to provide a certificate for a Potential Impact Classification or a Dam Safety Assurance Programme for the purposes of the Regulations for a dam they were involved in designing or constructing. Although the Act permits an engineer to audit and/or certify their own work, there are reasons why this may not always be appropriate. This document outlines when and how conflicts of interest may arise under the Regulations and provides guidance from Engineering New Zealand on managing such conflicts.

Conflicts of interest

What is a conflict of interest?

A conflict of interest arises when someone is compromised because their personal interests or obligations conflict with the responsibilities of their job or position. It means that their independence, objectivity or impartiality may be called into question. A conflict of interest can be actual (where the conflict already exists), potential (where the conflict is about to happen or could happen), or perceived (where other people might reasonably think that a person has been compromised).

Having an interest on its own does not necessarily mean there is a conflict of interest. For example, an engineer might as a resident of a town have a personal interest in the integrity of a dam near their house. That does not automatically mean they would have a conflict of interest in accepting work to audit that dam. That personal interest would only become a potential conflict of interest if it overlapped in some way with the engineer's role, for example if the engineer was also a part owner of the farm on which the dam was located.

The Code of Ethical Conduct

The Code of Ethical Conduct which applies to both Chartered Professional Engineers and members of Engineering New Zealand requires engineers to disclose and appropriately manage conflicts of interest:

42F Behave appropriately

A chartered professional engineer, in performing, or in connection with, the engineer's engineering activities,—

(a) must—

... (iii) disclose and appropriately manage conflicts of interest; and

The Chartered Professional Engineers of New Zealand (No 2) Rules 2002 defines "*material conflict of interest*" as "*in relation to any matter, a financial or other interest that is likely to affect a person's judgment on that matter*".

The Code doesn't require engineers to refuse to act where they may have a conflict of interest. Rather, it requires that they disclose the conflict and take action to appropriately manage it. This may of course in some cases be best managed by declining an engagement. In other cases however, there may be other protocols or quality assurance mechanisms that can be used to mitigate the potential conflict, such as third party reviews or an in-firm informational barrier or ethics screen allowing two teams to operate independently from each other. If the conflict is handled appropriately, it does not need to be a problem.

Recognised Engineers

Under the Regulations, the Recognised Engineer role is limited to the certification of Potential Impact Classifications, Dam Safety Assurance Programmes, and annual Dam Compliance before these are submitted to the regional authority for approval.

The Recognised Engineer's specific role under the Regulations is an auditing and certifying function. Specifically, the role includes:

- for Potential Impact Classifications, to provide a certificate that states the Potential Impact Classification accords with the criteria and standards for dam safety (section 135(1)(b) of the Act);
- for Dam Safety Assurance Programmes, to provide a certificate that states the Dam Safety Assurance Programme meets the prescribed criteria and standards for dam safety and contains a full list of the dam's appurtenant structures (section 142(1)(b) of the Act); and
- for a Dam Compliance Certificate, to provide a certificate that confirms the Recognised Engineer has reviewed the dam owner's reports and other documents relating to the procedures in the Dam Safety Assurance Programme and all procedures have been complied with during the previous 12 months except for identified minor items of non-compliance (section 150(2)(f) of the Act).

The criteria and standards for the Potential Impact Classifications and Dam Safety Assurance Programmes are set out in the Regulations. A Potential Impact Classification and a Dam Safety Assurance Programme can be prepared by anyone, including the dam owner or an engineer. The Recognised Engineer's role is to certify the Potential Impact Classification and Dam Safety Assurance Programme before those are submitted to the regional authority.

There are two main instances where a potential conflict of interest may arise:

1. where a Recognised Engineer or their firm was involved with the design and/or construction of the dam and the engineer is later engaged to certify a Potential Impact Classification or Dam Safety Assurance Programme, or provide a Dam Compliance Certificate for the same dam (the design engineer); and
2. where a Recognised Engineer or their firm prepared a Potential Impact Classification or Dam Safety Assurance Programme for a dam and the engineer is also engaged to certify that Potential Impact Classification or Dam Safety Assurance Programme, or provide a Dam Compliance Certificate for the same dam (certifying own work).

The design engineer: There is no prohibition in the legislation on an engineer certifying a Potential Impact Classification or Dam Safety Assurance Programme for a dam they designed or assisted to construct. Section 149 of the Building Act 2004 requires the Recognised Engineer must have no "financial interest" in the dam concerned. However, the Act expressly provides that a financial interest does not include involvement in the construction of the dam or receiving a fee for undertaking an audit or being employed or engaged by the dam owner. ("Construction", as defined by the Act, includes designing and building the dam).

MBIE has confirmed to us that the intent was to allow a Recognised Engineer to certify a Potential Impact Classification or Dam Safety Assurance Programme for a dam they have worked on so long as they do not have a financial interest in the dam. This is probably recognition of the relatively small number of practitioners in this reasonably specialised field of engineering. One of the concerns raised by submitters during the consultation on the proposed regulations was the lack of suitably trained and qualified engineers having the potential to delay implementation of and compliance with the regulations.

In responding to our query about the policy intent, the MBIE representative emphasised MBIE's understanding that Recognised Engineers, as chartered professional engineers, are subject to a Code of Conduct which requires them to disclose and manage any conflicts of interest.

Certifying own work: Section 140(5) of the Act expressly provides that “to avoid doubt” a Recognised Engineer may both prepare and audit a Dam Safety Assurance Programme.

There is no equivalent provision in relation to the certification of a Potential Impact Classification. This is probably because the way the legislation is worded; it is the dam owner who classifies the dam (section 134) and the engineer who audits the classification and certifies that the classification accords with the prescribed criteria and standards. That may however result in a situation where a Recognised Engineer is asked to certify a Potential Impact Classification, for the purposes of the Regulations, where the dam owner has classified the dam based on that same engineer’s earlier advice regarding the dam’s impact classification. The Regulations do not prevent a Recognised Engineer from doing this, however, it may be a situation the Recognised Engineer should consider declaring and addressing by the means discussed below.

Similarly with an annual Dam Compliance Certificate, it is the dam owner who supplies the dam compliance certificate (section 150(1)) and the engineer who confirms that all procedures in the dam safety assurance programme have been complied with (section 150(2)(f)) technically the engineer is not doing both parts of the role. However, the engineer is providing two separate pieces of advice to the dam owner and under the Code of Ethical Conduct this needs to be declare or considered.

When a Recognised Engineer should declare a conflict

Although, legally, the Act permits an engineer to essentially audit and/or certify their own work, Recognised Engineers need to consider the Code of Ethical Conduct and circumstances when this may not be appropriate.

A Recognised Engineer when certifying their own work should consider:

- benefit of having additional/different engineers involved in a situation may allow more opportunity for problems to be identified and addressed;
- Code of Ethical Conduct requires any conflicts of interest to be disclosed and managed;
- adverse effect on public perception of impartiality and independence;
- risk of predetermination because of earlier involvement with the dam;
- risk of expectation bias or a subconscious tendency to search for data that supports a predetermined outcome and to ignore contradictory information because of familiarity with the dam;
- possible implications for professional indemnity insurance if the conflict is not disclosed.

Dam safety is important at all stages of a dam’s life cycle. The benefit of involving different engineers in the process is having a fresh set of eyes on a situation which may provide the opportunity to identify and evaluate any issues that may have been otherwise overlooked or gone unaddressed.

Dam engineers have told us that the ability for Recognised Engineers to certify/audit their own Potential Impact Classifications and Dam Safety Assurance Programmes is an important consideration. Allowing for this will help facilitate compliance with the new Regulations.

In practice, it is likely that often the work involved with checking and auditing a Potential Impact Classification or Dam Safety Assurance Programme will be done by technical practitioners but signed off by a Recognised Engineer. This would be similar to, for example, a structural design being undertaken by one or more engineers in a firm with the Producer Statement – Design PS1 signed by the firm’s chartered professional engineer. In such a case, there is probably no actual conflict of interest but there may be a perceived conflict which may be addressed in the ways discussed below.

Ways to address a potential conflict of interest

There are a number of different ways an engineer could address a potential conflict of interest with the work;

- document the conflict with the dam owner and the regional authority, and continuing with the engagement subject to the consent of those parties; and/or
- document the conflict with the dam owner and the regional authority, and arranging for someone else in the engineer’s firm/partnership to do the work with the ultimate sign-off being by the Recognised Engineer subject to the consent of the parties; and/or
- decline to be engaged as the Recognised Engineer for that dam.

You will need to consider how best to address and manage any actual or potential conflicts you encounter.

Guidance

As is discussed in the Engineering New Zealand Practice Note 8 (2019): Being Ethical, *“If you think there may be an actual or potential conflict of interest between your interests and a client’s interests, discuss that with your client. If you’re not sure, it’s best to be open and transparent by telling the client and letting them decide and document this in writing.”*

Documenting a conflict

There is no requirement on the prescribed certification forms for the Recognised Engineer to declare or notify any conflicts of interest. However, appropriate management under the Code of Ethics would require documenting and declaring any conflict. This would need to be done separately by way of an email or letter to your client and/or the relevant regional authority.

We suggest something along the lines of *“I am the Recognised Engineer for the purposes of XYZ. I note that I was also the design engineer/certifying engineer/etc on this dam. I do not consider that I have any actual conflict of interest between these roles. However, if you believe otherwise, please contact me by DATE to discuss any concerns.”* Keep a copy of your email and the responses, on file.

Declining to act

As the dam owner - Although section 149 of the Building Act is drafted fairly widely to allow for a Recognised Engineer to be engaged in some cases which might otherwise be viewed as conflicts of interest, it would not, we think, be wide enough to allow for a situation in which a Recognised Engineer was also the dam owner. In that case, we believe the engineer would arguably have a financial interest and it would not be advisable to be the acting Recognised Engineer for that dam. We recommend caution for engineers in this type of situation.



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