WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1973

ENROLLED

SENATE BILL NO. 2057

(By Mr. Gainer)

PASSED April 14, 1973

In Effect July 1, 1973

FILED IN THE OFFICE
EDGAR P. HEISKELL III
SECRETARY OF STATE

THIS DATE 5/4/73
ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 2057

(Mr. Gainer, original sponsor)

[Passed April 14, 1973; in effect July 1, 1973.]

AN ACT to amend chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding there­to a new article, designated article five-d; and to amend and reenact section forty-seven, article three, chapter sixty-one of said code, all relating to regulation and control of dams; short title of article; legislative findings, intent and purpose of article to regulate certain dams; definition of terms; general pow­ers and duties of director of department of natural resources re­garding dams; establishing maximum fee for certificate of ap­proval; making it unlawful to place, construct, enlarge, alter, re­pair or remove certain dams without applying for and obtaining a certificate of approval from the director; plans and specifica­tions for dams to be in charge of a registered professional en­gineer; granting or rejecting applications for certificate of ap­proval by director; publication of notice of application; right to hearing upon application; content of certificates of approval for dams; revocation or suspension of certificates; inspections dur­ing progress of work on a dam; procedures for handling emer­gencies involving dams; requirements for dams completed prior to effective date of article; requirements for dams under con­struction prior to effective date of article; dam owner not re-
lieved of legal responsibilities by any provision of article; offenses and penalties; dams or obstructions in watercourses; penalty.

Be it enacted by the Legislature of West Virginia:

That chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article five-d; and that section forty-seven, article three, chapter sixty-one of said code be amended and reenacted, all to read as follows:

CHAPTER 20. NATURAL RESOURCES.

ARTICLE 5D. DAM CONTROL ACT.

§20-5D-1. Short title.

This article shall be known and cited as the "Dam Control Act."

§20-5D-2. Legislative findings; intent and purpose of article.

The Legislature finds that dams may constitute a potential hazard to people and property; therefore, dams in this state must be properly regulated and controlled to protect the health, safety and welfare of people and property in this state. It is the intent of the Legislature by this act to provide for the regulation and supervision of dams in this state to the extent necessary to protect the public health, safety and welfare. The Legislature has ordained this act to fulfill its responsibilities to the people of this state and to protect their lives and private and public property from the danger of a potential or actual dam failure.

§20-5D-3. Definition of terms used in article.

As used in this article, unless used in a context that clearly requires a different meaning, the term:

(a) "Alterations" or "repairs" means only those changes in the structure or integrity of a dam which may affect its safety, which determination shall be made by the director.

(b) "Application for a certificate of approval" means the request in writing by a person to the director requesting that such person be issued a certificate of approval.

(c) "Appurtenant works" mean any structure or facility
which is an adjunct of, or connected, appended or annexed to a dam, including but not limited to, spillways, a reservoir and its rim, low level outlet works, or water conduits such as tunnels, pipelines and penstocks either through the dam or its abutments.

(d) "Certificate of approval" means the approval in writing issued by the director to a person who has applied to the director for such certificate of approval which authorizes such person to place, construct, enlarge, alter, repair or remove a dam and specifies the conditions or limitations under which such work is to be performed by such person.

(e) "Dam" means an artificial barrier or obstruction, including any works appurtenant to it and any reservoir created by it, which is or will be placed, constructed, enlarged, altered or repaired so that it does or will impound or divert water and (1) is or will be fifteen feet or more in height from the natural bed of such stream or watercourse measured at the upstream toe of the dam and (2) which does or will create a reservoir of water covering ten acres or more of land: Provided, That the term "dam" shall not include (1) any dam owned by the federal government, or (2) any dam which was designed and constructed by or under the supervision of or which is under the jurisdiction of the United States soil conservation service, or (3) slack-water dams constructed and maintained in connection with public highways, streets, bridges, culverts or viaducts, which shall continue to be regulated and controlled as provided in article five of this chapter.

(f) "Department" means the department of natural resources.

(g) "Director" means the director of the department of natural resources.

(h) "Enlargement" means any change in or addition to an existing dam which (1) raises the height of the dam, (2) raises or may raise the water storage elevation of the water impounded by the dam, (3) increases or may increase the amount of water impounded by the dam, or (4) increases or may increase the watershed area from which water is impounded by the dam.

(i) "Person" means any public or private corporation, institution, association, society, firm, organization or company organized or existing under the laws of this or any other state
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or country; the state of West Virginia; any state governmental agency; any political subdivision of the state or of its counties or municipalities; sanitary district; public service district; drainage district; soil conservation district; watershed improvement district; partnership; trust; estate; person or individual; group of persons or individuals acting individually or as a group; or any other legal entity whatever. The term “person,” when used in this article, shall be understood to include and refer to any authorized agent, lessee or trustee of any of the foregoing or receiver or trustee appointed by any court for any of the foregoing.

(j) “Reservoir” means any basin which contains or will contain impounded water.

(k) “Water” means any liquid, including any solids or other matter which may be contained therein, which is or may be impounded by a dam.

(l) “Water storage elevation” means the maximum elevation that water can reach behind a dam without encroaching on the freeboard approved for the dam under flood conditions.

§20-5D-4. General powers and duties of director; maximum fee established for certificates of approval.

The director shall have the following powers and duties:

(a) To control and exercise regulatory jurisdiction over dams as provided for in this article;

(b) To review all applications for a certificate of approval for the placement, construction, enlargement, alteration, repair or removal of any dam;

(c) To grant, modify, amend, revoke, restrict or refuse to grant any certificate of approval based on a determination by him that such action is proper or necessary to protect life and property as provided in this article;

(d) To adopt, modify, repeal and enforce rules, and issue orders, which he shall do in accordance with the provisions of chapter twenty-nine-a of this code as if the provisions of said chapter twenty-nine-a were set forth in extenso herein to implement and make effective the powers and duties vested in him by the provisions of this article;

(e) To take any lawful action he deems necessary for the effective enforcement of the provisions of this article;
(f) To establish and charge reasonable fees not to exceed twenty-five dollars for the review of applications for certificates of approval and the issuance thereof.

(g) To employ qualified consultants or additional persons in the department as necessary to review applications for certificates of approval and to recommend whether they should be approved, to inspect dams and to enforce the provisions of this article;

(h) To cooperate and coordinate with agencies of the federal government, this state and counties and municipalities of this state to improve, secure, study and enforce dam safety and dam technology within this state; and

(i) To make any investigation or inspection necessary to implement or enforce the provisions of this article and to enter upon the public or private property of any dam owner as may be necessary to make such investigations or inspections. The director may make such investigations, inspections or entries after notifying the dam owner or other person in charge of such dam.

(j) To prepare and publish within a reasonable time, criteria to govern the design, construction, repair, inspection and maintenance of proposed dams herein defined, and to review these criteria annually in order to consider improved technology for inclusion in such criteria.

§20-5D-5. Unlawful to place, construct, enlarge, alter, repair or remove dam without certificate of approval; application required to obtain certificate.

After the thirtieth day of June, one thousand nine hundred seventy-three, it shall be unlawful for any person to place, construct, enlarge, alter, repair or remove any dam under the jurisdiction of the department until he has first (a) filed an application for a certificate of approval with the department and (b) obtained from the department a certificate of approval: Provided, That a person making routine repairs on a dam which do not affect the safety of the dam shall not be required to submit such application or have such certificate. A separate application for a certificate of approval must be submitted by a person for each dam he desires to place, construct, enlarge, alter, repair or remove except that, under rules adopted by the
director, one application may be valid for more than one dam
involved in a single project or formation of a reservoir.
Each application for a certificate of approval shall be made
in writing on a form prescribed by the director and shall be
signed and verified by the applicant. The application shall con-
tain and provide information which may be reasonably required
by the director to administer the provisions of this article.
§20-5D-6. Plans and specifications for dams to be in charge of
registered professional engineer.
Plans and specifications for placement, construction, en-
largement, alteration, repair or removal of dams shall be in
the charge of a registered professional engineer. Any plans or
specifications submitted to the department shall bear the seal
of a registered professional engineer.
§20-5D-7. Granting or rejecting applications for certificate of ap­
proval by department; publication of notice of appli­
cation; hearing upon application.
Upon receipt of an application for a certificate of approval
and the fee required under the provisions of this article and
rules promulgated thereunder, the director shall proceed to con­sider the application for sufficiency. The director shall ap­prove or disapprove the application within sixty days after re­ceiving it and the fee.
If an application is defective, it shall be returned to the
applicant by certified or registered mail, return receipt request­ed, in order that the applicant may correct any defect: Provided,
That the application must be returned to the department by the
applicant within thirty days after it has been returned to such
applicant or it shall be treated as a new application: Provided,
however, That the director may extend the thirty-day period.
Upon approval by the director of the sufficiency of the ap­plication, the director shall immediately cause a notice of such
application to be published at the owner’s expense as a Class
I legal advertisement in compliance with the provisions of
article three, chapter fifty-nine of this code, and the publication
area for such publication shall be the county in which the pro­posed dam is to be located or in which the existing dam is
located. Such notice shall include but not be limited to the name
and address of the owner of the dam and the location of the
dam for which the application was filed.

Any person whose life or property may be adversely affected
by the issuance of a certificate of approval shall have a right to
a hearing thereon before the director, providing that demand
in writing for such hearing containing specific objections to
the issuance of the certificate of approval is served upon the
director within fifteen days following such publication.

Upon receipt by the director of the service of such demand
for hearing, the director shall immediately set a date for such
hearing and notify the person or persons demanding such hear-
ing thereof, which hearing shall be held within ten days after
receipt of said demand. At such hearing the director shall hear
evidence and shall thereafter (1) refuse to issue a certificate of
approval, or (2) issue a certificate of approval which shall be
subject to such terms, conditions and limitations as the director
may deem necessary to protect life and property.

Actual placement, construction, enlargement, alteration, re-
pair or removal of a dam must be commenced within one year
after the certificate of approval for the project is issued by the
director, otherwise the certificate of approval becomes void:

Provided further, That the director may extend such one-year
period.

§20-5D-8. Content of certificates of approval for dams; revocation
or suspension of certificates.

Each certificate of approval issued by the director under
the provisions of this article and rules promulgated there-
under may contain such terms and conditions as the director
may prescribe.

The director may revoke or suspend any certificate of
approval whenever he determines that the dam for which
the certificate was issued constitutes a danger to life and
property. Whenever he deems such action necessary to
safeguard life and property, the director may also amend the
terms and conditions of any such certificate by issuing a new
certificate containing the revised terms and conditions.

Before any certificate of approval is amended or revoked
by the director, the director shall hold a hearing. Such hearing
and the administrative procedure prior to, during and follow-
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15 ing the same shall be governed by and be in accordance with
16 the provisions of article five, chapter twenty-nine-a of this
17 code in like manner as if the provisions of article five were
18 set forth in extenso in this section.
19 Any person adversely affected by an order entered follow-
20 ing such hearing shall have the right of judicial review thereof
21 in accordance with the provisions of section four, article five,
22 chapter twenty-nine-a of this code with like effect as if the
23 provisions of said section four were set forth in extenso
24 herein.
25 The judgment of a circuit court reviewing such order of the
26 director shall be final unless reversed, vacated or modified
27 on appeal to the supreme court of appeals in accordance
28 with the provisions of section one, article six, chapter twenty-
29 nine-a of this code.

§20-5D-9. Inspections during progress of work on dam.

1 During the placement, construction, enlargement, repair,
2 alteration or removal of any dam the director shall make,
3 either with the department's own engineers or by consulting
4 engineers or engineering organizations, periodic inspections
5 at state expense for the purpose of ascertaining compliance
6 with the approved plans and specifications. The director
7 shall require the owner at his expense to perform such work
8 or tests as necessary, to provide adequate supervision during
9 such placement, construction, enlargement, repair, alteration
10 or removal.
11 If at any time during placement, construction, enlargement,
12 repair, alteration or removal of any dam, the director finds
13 that the work is not being done in accordance with the
14 provisions of the original approved plans and specifications
15 or in accordance with the approved revised plans and
16 specifications, he shall give a written notice thereof by
17 certified or registered mail, return receipt requested, to the
18 owner involved.
19 The notice and order shall state the particulars in which
20 the original approved plans and specifications or the approved
21 revised plans and specifications are not being or have not
22 been complied with and shall order the immediate compliance
23 with the original approved plans and specifications or with
the approved revised plans and specifications as the case may be. The director may order that no further work be done until such compliance has been effected and approved by him.

If, after any such inspections, investigations or examinations, or at any time as the work progresses, it is found by the director that amendments, modifications, or changes are necessary to ensure the safety of the dam, he may order the owner to revise his plans and specifications. If conditions are revealed which will not permit the placement, construction, enlargement, repair, alteration or removal of the dam in a safe manner the certificate of approval shall be revoked.

Immediately upon completion of a new dam or enlargement, repair or alteration of a dam the owner shall give notice of completion to the director.

§20-5D-10. Procedures for handling emergencies involving dams; remedial actions to alleviate emergency; payment of costs of remedial actions to be paid by dam owner.

The owner of a dam shall have primary responsibility for determining when an emergency involving his dam exists. When the owner of a dam determines such emergency does exist, he shall notify the director and shall notify any persons who may be endangered if the dam should fail. The owner shall also immediately take any remedial action necessary to protect life and property.

The director shall, if he determines that an emergency exists involving a dam, notify any persons who may be endangered if the dam should fail and who have not been so notified and immediately take any remedial action necessary to protect life and property if in his judgment (a) the condition of the dam so endangers life and property that time is not sufficient to permit the issuance and enforcement of an order for the owner to correct the condition or (b) passing or imminent floods or other conditions threaten the safety of the dam. Remedial actions the director may take include, but are not limited to:

(1) Taking full charge and control of the dam.
(2) Lowering the level of water impounded by the dam by releasing such impounded water.
(3) Completely releasing all water impounded by the dam.

(4) Performing any necessary remedial or protective work at the site of the dam.

(5) Taking any other steps necessary in the opinion of the director to safeguard life and property.

Once the director has taken full charge of the dam, the director shall continue in full charge and control of such dam until, in the director's opinion, it has been rendered safe or the emergency occasioning the action has ceased and the owner is adjudged competent by the director to reassume control of such dam and its operation. The assumption by the director of the control of the dam will not relieve the owner of a dam of liability for any negligent acts the owner commits or which are committed by his agents.

In case of an emergency where the director declares that making repairs to the dam or breaching of the dam is immediately necessary to safeguard life and property, repairs or breaching shall be started immediately by the owner, or by the director at the owner's expense, if the owner fails to do so. The owner shall notify the director at once of any emergency repairs or breaching the owner proposes to undertake and of work he has under way to alleviate the emergency. The proposed repairs, breaching and work shall be made to conform to such orders as the director may issue.

The costs reasonably incurred in any remedial action taken by the director as provided in this article shall be paid for initially by funds appropriated to the department of natural resources for such purposes, and such sums so expended, if not promptly repaid by the owner upon request of the director, shall be recovered from the owner by appropriate civil action to be initiated by the attorney general upon request of the director.

§20-5D-11. Requirements for dams completed prior to effective date of this article.

The director shall give notice to file an application for a certificate of approval to every owner of a dam which was completed prior to the effective date of this article. Such notice shall be given by certified or registered mail, return receipt requested, to the owner at his last address of record in
the office of the county assessor of the county in which the

dam is located and such mailing shall constitute service. A

separate application for each dam a person owns shall be filed

with the director in writing upon forms supplied by him and

shall include or be accompanied by appropriate information

concerning the dam as the director requires.

The director shall make inspections of such dams or reservoirs at state expense. The director shall require owners of

such dams to perform at their expense such work or tests as

may reasonably be required to disclose information sufficient to

enable the director to determine whether to issue a certificate

of approval or to issue an order directing further work at the

owner's expense necessary to safeguard life and property. For

this purpose, the director may require an owner to lower the

water level of, or to empty, water impounded by the dam ad­

judged by the director to be unsafe. If, upon inspection or upon

completion to the satisfaction of the director of all work that

he ordered, the director finds that the dam is safe to impound

water, a certificate of approval shall be issued.

§20-5D-12. Requirements for dams under construction prior to effective date of article.

Any dam which the director finds was under construction

and based on his findings not fifty percent constructed on the

effective date of this article shall, except as provided in the

next succeeding paragraph, be subject to the same provisions of

this article as a dam commenced after that date. Every owner

of such a dam shall file an application with the director for the

director's written approval of the plans and specifications of

the dam.

Construction work on such a dam may proceed, provided an

application for approval of the plans and specifications there­

for is filed, until a certificate of approval is received by the

owner from the director approving the dam or an order is re­

ceived by the owner from the director specifying how the con­

struction must be performed to render the dam safe. After re­

ceipt of an order specifying how construction of the dam must

be performed, work thereafter must be in accordance with the

order.

Dams which are determined by the director to be fifty per-
cent or more constructed on the effective date of this article shall be subject to the same supervision as dams which were completed prior thereto.

§20-5D-13. Dam owner not relieved of legal responsibilities by any provision of article.

Nothing in this article shall be construed to relieve the owner of a dam of the legal duties, obligations or liabilities incident to the ownership or operation of a dam.

§20-5D-14. Offenses and penalties.

(a) Any person who violates any of the provisions of this article or of any certificate of approval, order, rule or requirement of the director or department shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned in the county jail not more than six months, or both fined and imprisoned.

(b) Any person who willfully obstructs, hinders or prevents the director or department or its agents or employees from performing the duties imposed on them by the provisions of this article or who willfully resists the exercise of the control and supervision conferred by the provisions of this article upon the director or department or its agents or employees or any owner or any person acting as a director, officer, agent, or employee of an owner, or any contractor or agent or employee of a contractor who engages in the placement, construction, enlargement, repair, alteration, maintenance or removal of any dam who knowingly does work or permits work to be executed on the dam without a certificate of approval or in violation of or contrary to any approval as provided for by the provisions of this article, or any inspector, agent or employee of the department who has knowledge of such work being done and who fails to immediately notify the director thereof shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one thousand dollars nor more than five thousand dollars, or imprisoned in the county jail not more than one year, or both fined and imprisoned.
CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

ARTICLE 3. CRIMES AGAINST PROPERTY.

§61-3-47. Dams or obstructions in watercourses; penalty.

No person shall fell any timber and permit the same to remain in any navigable or floatable stream of this state when to do so shall obstruct the passage of boats, rafts, staves, ties or timber of any kind.

Except as may be provided in chapter twenty of this code, no person shall construct or maintain any dam or other structure in any stream or watercourse, which shall in any way prevent or obstruct the free and easy passage of fish up or down such stream or watercourse, without first providing as a part of such dam or other structure a suitable fish ladder, way or flume, so constructed as to allow fish easily to ascend or descend the same; which ladder, way or flume shall be constructed only upon plans, in a manner, and at a place, satisfactory to the natural resources commission: Provided, That if the director of the department of natural resources determines that there is no substantial fish life in such stream or watercourse, or that the installation of a fish ladder, way or flume would not facilitate the free and easy passage of fish up or down a stream or watercourse, or that an industrial development project requires the construction of such dam or other structure and the installation of an operational fish ladder, way or flume is impracticable, he may, in writing, permit the construction or maintenance of a dam or other structure in a stream or watercourse without providing a suitable fish ladder, way or flume; and in all navigable and floatable streams provisions shall be made in such dam or structure for the passage of boats and other crafts, logs and other materials: Provided, however, That this section shall not relieve such person from liability for damage to any riparian owner on account of the construction or maintenance of such dam.

Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year, or both fined and imprisoned, and, whether conviction be had under this section or not, such violation shall be deemed a nuis-
ance, which may be abated at the suit of any citizen or taxpayer, the county court of the county, or, as to fish ladders, at the suit of the director of the department of natural resources, and, if the same endangers county roads, the county court may abate such nuisance peaceably without such suit.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

N. Darrel Darby
Chairman Senate Committee

Lawrence L. Chuichi Jr.
Chairman House Committee

Originated in the Senate.

H. W. Carson
Clerk of the Senate

I. A. Blankenship
Clerk of the House of Delegates

W. F. Brotherton Jr.
President of the Senate

Lewis F. Thomas
Speaker House of Delegates

The within ______________ approved this the 27th
day of ______________, 1973.

Arch A. Beene
Governor
PRESENTED TO THE GOVERNOR

Date 4/21/73
Time 10:39 a.m.