

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1973

ENROLLED

Comm. Sub.
SENATE BILL NO. 2057

(By Mr. *Gainer*)

PASSED *April 14,* 1973

In Effect *July 1, 1973* ~~Passage~~

FILED IN THE OFFICE
EDGAR F. HEISKELL III
SECRETARY OF STATE
THIS DATE *5/4/73*

2057

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.

1 The Legislature finds that dams may constitute a potential
2 hazard to people and property; therefore, dams in this state
3 must be properly regulated and controlled to protect the health,
4 safety and welfare of people and property in this state. It is the
5 intent of the Legislature by this act to provide for the regula-
6 tion and supervision of dams in this state to the extent necessary
7 to protect the public health, safety and welfare. The Legisla-
8 ture has ordained this act to fulfill its responsibilities to the
9 people of this state and to protect their lives and private and
10 public property from the danger of a potential or actual dam
11 failure.

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

1 As used in this article, unless used in a context that clearly
2 requires a different meaning, the term:
3 (a) "Alterations" or "repairs" means only those changes in
4 the structure or integrity of a dam which may affect its safety,
5 which determination shall be made by the director.
6 (b) "Application for a certificate of approval" means the
7 request in writing by a person to the director requesting that
8 such person be issued a certificate of approval.
9 (c) "Appurtenant works" mean any structure or facility

10 which is an adjunct of, or connected, appended or annexed to
11 a dam, including but not limited to, spillways, a reservoir and
12 its rim, low level outlet works, or water conduits such as tun-
13 nels, pipelines and penstocks either through the dam or its
14 abutments.

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

21 (e) "Dam" means an artificial barrier or obstruction, includ-
22 ing any works appurtenant to it and any reservoir created by
23 it, which is or will be placed, constructed, enlarged, altered or
24 repaired so that it does or will impound or divert water and
25 (1) is or will be fifteen feet or more in height from the
26 natural bed of such stream or watercourse measured at the
27 upstream toe of the dam and (2) which does or will create a
28 reservoir of water covering ten acres or more of land: *Pro-*
29 *vided*, That the term "dam" shall not include (1) any dam
30 owned by the federal government, or (2) any dam which was
31 designed and constructed by or under the supervision of or
32 which is under the jurisdiction of the United States soil con-
33 servation service, or (3) slack-water dams constructed and
34 maintained in connection with public highways, streets, bridges,
35 culverts or viaducts, which shall continue to be regulated and
36 controlled as provided in article five of this chapter.

37 (f) "Department" means the department of natural re-
38 sources.

39 (g) "Director" means the director of the department of na-
40 tural resources.

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

48 (i) "Person" means any public or private corporation, in-
49 stitution, association, society, firm, organization or company
50 organized or existing under the laws of this or any other state

51 or country; the state of West Virginia; any state governmental
52 agency; any political subdivision of the state or of its counties
53 or municipalities; sanitary district; public service district; drain-
54 age district; soil conservation district; watershed improvement
55 district; partnership; trust; estate; person or individual; group of
56 persons or individuals acting individually or as a group; or any
57 other legal entity whatever. The term "person," when used
58 in this article, shall be understood to include and refer to
59 any authorized agent, lessee or trustee of any of the foregoing
60 or receiver or trustee appointed by any court for any of the
61 foregoing.

62 (j) "Reservoir" means any basin which contains or will
63 contain impounded water.

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

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

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

1 The director shall have the following powers and duties:

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

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

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

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

17 (e) To take any lawful action he deems necessary for the
18 effective enforcement of the provisions of this article;

19 (f) To establish and charge reasonable fees not to exceed
20 twenty-five dollars for the review of applications for certifi-
21 cates of approval and the issuance thereof.

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

27 (h) To cooperate and coordinate with agencies of the fed-
28 eral government, this state and counties and municipalities of
29 this state to improve, secure, study and enforce dam safety and
30 dam technology within this state; and

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

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

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

1 After the thirtieth day of June, one thousand nine hundred
2 seventy-three, it shall be unlawful for any person to place,
3 construct, enlarge, alter, repair or remove any dam under the
4 jurisdiction of the department until he has first (a) filed an
5 application for a certificate of approval with the department
6 and (b) obtained from the department a certificate of approval:
7 *Provided*, That a person making routine repairs on a dam
8 which do not affect the safety of the dam shall not be required
9 to submit such application or have such certificate. A separate
10 application for a certificate of approval must be submitted by a
11 person for each dam he desires to place, construct, enlarge,
12 alter, repair or remove except that, under rules adopted by the

13 director, one application may be valid for more than one dam
14 involved in a single project or formation of a reservoir.

15 Each application for a certificate of approval shall be made
16 in writing on a form prescribed by the director and shall be
17 signed and verified by the applicant. The application shall con-
18 tain and provide information which may be reasonably required
19 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.**

1 Plans and specifications for placement, construction, en-
2 largement, alteration, repair or removal of dams shall be in
3 the charge of a registered professional engineer. Any plans or
4 specifications submitted to the department shall bear the seal
5 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.**

1 Upon receipt of an application for a certificate of approval
2 and the fee required under the provisions of this article and
3 rules promulgated thereunder, the director shall proceed to con-
4 sider the application for sufficiency. The director shall ap-
5 prove or disapprove the application within sixty days after re-
6 ceiving it and the fee.

7 If an application is defective, it shall be returned to the
8 applicant by certified or registered mail, return receipt request-
9 ed, in order that the applicant may correct any defect: *Provided,*
10 That the application must be returned to the department by the
11 applicant within thirty days after it has been returned to such
12 applicant or it shall be treated as a new application: *Provided,*
13 *however,* That the director may extend the thirty-day period.

14 Upon approval by the director of the sufficiency of the ap-
15 plication, the director shall immediately cause a notice of such
16 application to be published at the owner's expense as a Class
17 I legal advertisement in compliance with the provisions of
18 article three, chapter fifty-nine of this code, and the publication
19 area for such publication shall be the county in which the pro-
20 posed dam is to be located or in which the existing dam is
21 located. Such notice shall include but not be limited to the name

22 and address of the owner of the dam and the location of the
23 dam for which the application was filed.

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

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

39 Actual placement, construction, enlargement, alteration, re-
40 pair or removal of a dam must be commenced within one year
41 after the certificate of approval for the project is issued by the
42 director, otherwise the certificate of approval becomes void:
43 *Provided further*, That the director may extend such one-year
44 period.

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

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

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

12 Before any certificate of approval is amended or revoked
13 by the director, the director shall hold a hearing. Such hearing
14 and the administrative procedure prior to, during and follow-

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

24 the approved revised plans and specifications as the case may
25 be. The director may order that no further work be done
26 until such compliance has been effected and approved by
27 him.

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

36 Immediately upon completion of a new dam or enlarge-
37 ment, repair or alteration of a dam the owner shall give
38 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.**

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

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

- 19 (1) Taking full charge and control of the dam.
- 20 (2) Lowering the level of water impounded by the dam
- 21 by releasing such impounded water.

22 (3) Completely releasing all water impounded by the
23 dam.

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

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

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

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

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

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

1 The director shall give notice to file an application for a
2 certificate of approval to every owner of a dam which was
3 completed prior to the effective date of this article. Such no-
4 tice shall be given by certified or registered mail, return re-
5 ceipt requested, to the owner at his last address of record in

6 the office of the county assessor of the county in which the
7 dam is located and such mailing shall constitute service. A
8 separate application for each dam a person owns shall be filed
9 with the director in writing upon forms supplied by him and
10 shall include or be accompanied by appropriate information
11 concerning the dam as the director requires.

12 The director shall make inspections of such dams or reser-
13 voirs at state expense. The director shall require owners of
14 such dams to perform at their expense such work or tests as
15 may reasonably be required to disclose information sufficient to
16 enable the director to determine whether to issue a certificate
17 of approval or to issue an order directing further work at the
18 owner's expense necessary to safeguard life and property. For
19 this purpose, the director may require an owner to lower the
20 water level of, or to empty, water impounded by the dam ad-
21 judged by the director to be unsafe. If, upon inspection or upon
22 completion to the satisfaction of the director of all work that
23 he ordered, the director finds that the dam is safe to impound
24 water, a certificate of approval shall be issued.

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

1 Any dam which the director finds was under construction
2 and based on his findings not fifty percent constructed on the
3 effective date of this article shall, except as provided in the
4 next succeeding paragraph, be subject to the same provisions of
5 this article as a dam commenced after that date. Every owner
6 of such a dam shall file an application with the director for the
7 director's written approval of the plans and specifications of
8 the dam.

9 Construction work on such a dam may proceed, provided an
10 application for approval of the plans and specifications there-
11 for is filed, until a certificate of approval is received by the
12 owner from the director approving the dam or an order is re-
13 ceived by the owner from the director specifying how the con-
14 struction must be performed to render the dam safe. After re-
15 ceipt of an order specifying how construction of the dam must
16 be performed, work thereafter must be in accordance with the
17 order.

18 Dams which are determined by the director to be fifty per-

19 cent or more constructed on the effective date of this article
20 shall be subject to the same supervision as dams which were
21 completed prior thereto.

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

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

§20-5D-14. Offenses and penalties.

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

8 (b) Any person who willfully obstructs, hinders or pre-
9 vents the director or department or its agents or employees
10 from performing the duties imposed on them by the provisions
11 of this article or who willfully resists the exercise of the control
12 and supervision conferred by the provisions of this article
13 upon the director or department or its agents or employees
14 or any owner or any person acting as a director, officer, agent,
15 or employee of an owner, or any contractor or agent or em-
16 ployee of a contractor who engages in the placement, con-
17 struction, enlargement, repair, alteration, maintenance or re-
18 moval of any dam who knowingly does work or permits work
19 to be executed on the dam without a certificate of approval or
20 in violation of or contrary to any approval as provided for by
21 the provisions of this article, or any inspector, agent or em-
22 ployee of the department who has knowledge of such work
23 being done and who fails to immediately notify the director
24 thereof shall be guilty of a misdemeanor, and, upon con-
25 viction thereof, shall be fined not less than one thousand
26 dollars nor more than five thousand dollars, or imprisoned
27 in the county jail not more than one year, or both fined and
28 imprisoned.

CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

ARTICLE 3. CRIMES AGAINST PROPERTY.

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

1 No person shall fell any timber and permit the same to re-
 2 main in any navigable or floatable stream of this state when
 3 to do so shall obstruct the passage of boats, rafts, staves, ties
 4 or timber of any kind.

5 Except as may be provided in chapter twenty of this code,
 6 no person shall construct or maintain any dam or other struc-
 7 ture in any stream or watercourse, which shall in any way pre-
 8 vent or obstruct the free and easy passage of fish up or down
 9 such stream or watercourse, without first providing as a part
 10 of such dam or other structure a suitable fish ladder, way or
 11 flume, so constructed as to allow fish easily to ascend or de-
 12 scend the same; which ladder, way or flume shall be construct-
 13 ed only upon plans, in a manner, and at a place, satisfactory to
 14 the natural resources commission: *Provided*, That if the direc-
 15 tor of the department of natural resources determines that there
 16 is no substantial fish life in such stream or watercourse, or
 17 that the installation of a fish ladder, way or flume would not
 18 facilitate the free and easy passage of fish up or down a
 19 stream or watercourse, or that an industrial development proj-
 20 ect requires the construction of such dam or other structure and
 21 the installation of an operational fish ladder, way or flume is
 22 impracticable, he may, in writing, permit the construction or
 23 maintenance of a dam or other structure in a stream or water-
 24 course without providing a suitable fish ladder, way or flume;
 25 and in all navigable and floatable streams provisions shall be
 26 made in such dam or structure for the passage of boats and
 27 other crafts, logs and other materials: *Provided, however*, That
 28 this section shall not relieve such person from liability for
 29 damage to any riparian owner on account of the construction
 30 or maintenance of such dam.

31 Any person who shall violate any of the provisions of this
 32 section shall be guilty of a misdemeanor, and, upon convic-
 33 tion thereof, shall be fined not exceeding one thousand dollars,
 34 or imprisoned in the county jail not exceeding one year, or
 35 both fined and imprisoned, and, whether conviction be had un-
 36 der this section or not, such violation shall be deemed a nuis-

37 ance, which may be abated at the suit of any citizen or tax-
38 payer, the county court of the county, or, as to fish ladders,
39 at the suit of the director of the department of natural re-
40 sources, and, if the same endangers county roads, the county
41 court may abate such nuisance peaceably without such suit.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

H. Darrel Darby
Chairman Senate Committee

Clarence C. Christian, Jr.
Chairman House Committee

Originated in the Senate.

Takes effect July 1, 1973.

Howard W. Carson
Clerk of the Senate

C. A. Blankenship
Clerk of the House of Delegates

W. T. Brotherton, Jr.
President of the Senate

Lewis J. Williams
Speaker House of Delegates

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

Arch A. Pearce, Jr.
Governor

PRESENTED TO THE
GOVERNOR

Date 4/27/73

Time 10:39 a.m.