

SB 467

FILED

2008 APR -1 AM 11:07

WEST VIRGINIA LEGISLATURE

SEVENTY-EIGHTH LEGISLATURE

REGULAR SESSION, 2008

CLERK OF STATE

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 467

(SENATORS UNGER, PREZIOSO, PLYMALE, JENKINS, FOSTER,
STOLLINGS, HUNTER AND LOVE, *original sponsors*)

[Passed March 8, 2008; in effect ninety days from passage.]

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AN ACT to amend and reenact §22-14-3, §22-14-15 and §22-14-19 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto three new sections, designated §22-14-20, §22-14-21 and §22-14-22, all relating to dam safety; defining terms; providing for the establishment, administration and management of the Dam Safety Rehabilitation Revolving Fund; providing moneys for the fund; providing eligibility requirements to receive loans from the fund; providing rule-making

authority; providing application requirements for loans from the fund; establishing loan agreement requirements; providing for collection of moneys due the fund; providing authority to the Department of Environmental Protection for deficient dams that are privately owned by a noncompliant dam owner; and establishing civil penalties.

Be it enacted by the Legislature of West Virginia:

That §22-14-3, §22-14-15 and §22-14-19 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto three new sections, designated §22-14-20, §22-14-21 and §22-14-22, all to read as follows:

ARTICLE 14. DAM CONTROL ACT.

§22-14-3. Definition of terms used in article.

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

3 (a) "Alterations" or "repairs" means only those
4 changes in the structure or integrity of a dam that may
5 affect its safety to be determined by the secretary.

6 (b) "Application for a certificate of approval" means
7 the written application provided to the secretary
8 requesting that a person be issued a certificate of
9 approval.

10 (c) "Appurtenant works" means any structure or
11 facility that is an adjunct of, or connected, appended or
12 annexed to, a dam, including, but not limited to,
13 spillways, a reservoir and its rim, low-level outlet
14 works or water conduits such as tunnels, pipelines and

15 penstocks either through the dam or its abutments.

16 (d) "Authority" means the Water Development
17 Authority provided in section four, article one, chapter
18 twenty-two-c of this code.

19 (e) "Certificate of approval" means the written
20 approval issued by the secretary to a person who has
21 applied to the secretary for a certificate of approval
22 that authorizes the person to place, construct, enlarge,
23 alter, repair or remove a dam and specifies the
24 conditions or limitations under which the work is to be
25 performed by that person.

26 (f)(1) "Dam" means an artificial barrier or
27 obstruction, including any works appurtenant to it and
28 any reservoir created by it, which is or will be placed,
29 constructed, enlarged, altered or repaired so that it does
30 or will impound or divert water and:

31 (A) Is or will be twenty-five feet or more in height
32 from the natural bed of the stream or watercourse
33 measured at the downstream toe of the barrier and
34 which does or can impound fifteen acre-feet or more of
35 water; or

36 (B) Is or will be six feet or more in height from the
37 natural bed of the stream or watercourse measured at
38 the downstream toe of the barrier and which does or
39 can impound fifty acre-feet or more of water;

40 (2) "Dam" does not mean:

41 (A) Any dam owned by the federal government;

42 (B) Any dam for which the operation and
43 maintenance of the dam is the responsibility of the
44 federal government;

45 (C) Farm ponds constructed and used primarily for
46 agricultural purposes, including, but not limited to,
47 livestock watering, irrigation, retention of animal
48 wastes and fish culture and that have no potential to
49 cause loss of human life in the event of embankment
50 failure; or

51 (D) Roadfill or other transportation structures that do
52 not or will not impound water under normal conditions
53 and that have a designed culvert or similar conveyance
54 or capacity that would be used under a state designed
55 highway at the same location: *Provided*, That the
56 secretary may apply the provisions of section ten of this
57 article for roadfill or other transportation structures
58 that become a hazard to human life or property through
59 the frequent or continuous impoundment of water.

60 (g) "Deficient dam" means a noncoal-related dam
61 that exhibits one or more design, maintenance or
62 operational problems that may adversely affect the
63 performance of the dam over a period of time or during
64 a major storm or other inclement weather that may
65 cause loss of life or property; or a noncoal-related dam
66 that otherwise fails to meet the requirements of this
67 article.

68 (h) "Department" means the Department of
69 Environmental Protection.

70 (i) "Enlargement" means any change in or addition to
71 an existing dam which: (1) Raises the height of the dam;

72 (2) raises or may raise the water storage elevation of the
73 water impounded by the dam; (3) increases or may
74 increase the amount of water impounded by the dam; or
75 (4) increases or may increase the watershed area from
76 which water is impounded by the dam.

77 (j) "Noncompliant dam owner" means an owner who
78 has received two or more orders to repair or remove a
79 deficient dam without completion of the repairs or
80 removal within time frames established by the
81 secretary.

82 (k) "Person" means any public or private corporation,
83 institution, association, society, firm, organization or
84 company organized or existing under the laws of this or
85 any other state or country; the State of West Virginia;
86 any state governmental agency; any political
87 subdivision of the state or of its counties or
88 municipalities; a sanitary district; a public service
89 district; a drainage district; a conservation district; a
90 watershed improvement district; a partnership, trust, or
91 estate; a person or individual; a group of persons or
92 individuals acting individually or as a group; or any
93 other legal entity. The term "person", when used in this
94 article, includes and refers to any authorized agent,
95 lessee or trustee of any of the foregoing or receiver or
96 trustee appointed by any court for any of the foregoing.

97 (l) "Reservoir" means any basin which contains or
98 will contain impounded water.

99 (m) "Secretary" means the Secretary of the
100 Department of Environmental Protection.

101 (n) "Natural Resources Conservation Service" means

102 the Natural Resources Conservation Service of the
103 United States Department of Agriculture or any
104 successor or predecessor agency, including the Soil
105 Conservation Service.

106 (o) "Water" means any liquid, including any solids or
107 other matter that may be contained in the liquid, which
108 is or may be impounded by a dam.

109 (p) "Water storage elevation" means the maximum
110 elevation that water can reach behind a dam without
111 encroaching on the freeboard approved for the dam
112 under flood conditions.

§22-14-15. Civil penalties and injunctive relief.

1 (a) Any person who violates any provision of this
2 article, any certificate of approval or any rule, notice or
3 order issued pursuant to this article is subject to a civil
4 administrative penalty, to be levied by the secretary, of
5 not more than five thousand dollars for each day the
6 violation continues, not to exceed a maximum of twenty
7 thousand dollars. In assessing any penalty, the
8 secretary shall take into account the seriousness of the
9 violation and any good faith efforts to comply with
10 applicable requirements as well as any other
11 appropriate factors as may be established by rules
12 proposed by the secretary for legislative approval
13 pursuant to article three, chapter twenty-nine-a of this
14 code. No assessment may be levied pursuant to this
15 subsection until after the alleged violator has been
16 notified by certified mail or personal service. The
17 notice shall include a reference to the section of the
18 statute, rule, notice, order or statement of the certificate
19 of approval's terms that was allegedly violated, a

20 concise statement of the facts alleged to constitute the
21 violation, a statement of the amount of the civil
22 administrative penalty to be imposed and a statement
23 of the alleged violator's right to an informal hearing.
24 The alleged violator has twenty calendar days from
25 receipt of the notice within which to deliver to the
26 secretary a written request for an informal hearing. If
27 no hearing is requested, the notice becomes a final
28 order after the expiration date of the twenty-day
29 period. If a hearing is requested, the secretary shall
30 inform the alleged violator of the time and place of the
31 hearing. Within thirty days following the informal
32 hearing, the secretary shall issue and furnish to the
33 violator a written decision, and the reasons for the
34 decision, concerning the assessment of a civil
35 administrative penalty. The authority to levy a civil
36 administrative penalty is in addition to all other
37 enforcement provisions of this article and the payment
38 of any assessment does not affect the availability of any
39 other enforcement provision in connection with the
40 violation for which the assessment is levied: *Provided,*
41 *That no combination of assessments against a violator*
42 *shall exceed twenty thousand dollars per day of each*
43 *violation: Provided, however, That any violation for*
44 *which the violator has paid a civil administrative*
45 *penalty assessed under this subsection is not subject to*
46 *a separate civil penalty action under this article to the*
47 *extent of the amount of the civil administrative penalty*
48 *paid. Civil administrative penalties shall be levied in*
49 *accordance with the rules promulgated under the*
50 *authority of section four of this article. The net*
51 *proceeds of assessments collected pursuant to this*
52 *subsection shall be deposited in the dam safety fund*
53 *established pursuant to section eighteen of this article.*
54 Any person adversely affected by the assessment of a

55 civil administrative penalty has the right to appeal to
56 the Environmental Quality Board pursuant to the
57 provisions of article one, chapter twenty-two-b of this
58 code.

59 (b) No assessment levied pursuant to subsection (a) of
60 this section is due and payable until the procedures for
61 review of the assessment as set out in said subsection
62 have been completed.

63 (c) Any person who violates any provision of any
64 certificate issued under or subject to the provisions of
65 this article is subject to a civil penalty not to exceed
66 twenty-five thousand dollars per day of the violation
67 and any person who violates any provision of this
68 article or of any rule or who violates any standard or
69 order promulgated or made and entered under the
70 provisions of this article is subject to a civil penalty not
71 to exceed twenty-five thousand dollars per day of the
72 violation. The civil penalty may be imposed and
73 collected only by a civil action instituted by the
74 secretary in the circuit court of Kanawha County or in
75 the county in which the violation or noncompliance
76 exists or is taking place.

77 Upon application by the secretary, the circuit courts
78 of this state or the judges thereof in vacation may by
79 injunction compel compliance with and enjoin
80 violations of the provisions of this article and rules
81 proposed in accordance with section four of this article,
82 the terms and conditions of any certificate of approval
83 granted under the provisions of this article or any order
84 of the secretary or Environmental Quality Board and
85 the venue of any action shall be in the circuit court of
86 Kanawha County or in the county in which the

87 violation or noncompliance exists or is taking place.
88 The court or the judge thereof in vacation may issue a
89 temporary or preliminary injunction in any case
90 pending a decision on the merits of any injunctive
91 application filed. In seeking an injunction, it is not
92 necessary for the secretary to post bond or to allege or
93 prove at any stage of the proceeding that irreparable
94 damage will occur if the injunction is not issued or that
95 the remedy at law is inadequate. An application for
96 injunctive relief or a civil penalty action under this
97 section may be filed and relief granted notwithstanding
98 the fact that all administrative remedies provided in
99 this article have not been exhausted or invoked against
100 the person or persons against whom the relief is sought.

101 The judgment of the circuit court upon any
102 application filed or in any civil action instituted under
103 the provisions of this section is final unless reversed,
104 vacated or modified on appeal to the Supreme Court of
105 Appeals. An appeal shall be sought in the manner
106 provided by law for appeals from circuit courts in other
107 civil cases, except that the petition seeking review of an
108 order in any injunction proceeding must be filed with
109 the Supreme Court of Appeals within ninety days from
110 the date of entry of the judgment of the circuit court.

111 (d) Upon request of the secretary, the Attorney
112 General or the prosecuting attorney of the county in
113 which the violation occurs shall assist the secretary in
114 any civil action under this section.

115 (e) In any action brought pursuant to the provisions of
116 this section, the state or any agency of the state which
117 prevails may be awarded costs and reasonable
118 attorney's fees.

§22-14-19. Dam Safety Rehabilitation Revolving Fund established; disbursement of fund moneys.

1 (a) There is created in the State Treasury a special
2 revenue fund known as the Dam Safety Rehabilitation
3 Revolving Fund. The fund shall be comprised of money
4 allocated to the state by the federal government
5 expressly for the purposes of establishing and
6 maintaining a state Dam Safety Rehabilitation
7 Revolving Fund. The fund shall also include all
8 receipts from loans made by the fund, any moneys
9 appropriated by the Legislature, all income from the
10 investment of moneys held in the fund and all other
11 moneys designated for deposit to the fund from any
12 source, public or private. The fund shall operate as a
13 special revenue fund and all deposits and payments into
14 the fund do not expire to the General Revenue Fund,
15 but shall remain in the account and be available for
16 expenditure in succeeding fiscal years.

17 (b) The fund, to the extent that money is available,
18 shall be used solely to make loans to persons who own
19 an interest in a deficient dam on the list of deficient
20 dams created pursuant to section twenty of this article
21 to finance the engineering, design, alteration,
22 improvement, repair, breaching or removal of the
23 deficient dam necessary to correct or remove the
24 deficiencies and other activities as authorized by a
25 federal grant, a legislative appropriation or by the
26 secretary pursuant to section twenty-two of this article.
27 The fund may also be used to defray costs incurred by
28 the department or the authority in administering the
29 provisions of this subsection.

30 (c) The secretary, in consultation with the authority,

31 shall promulgate rules, in accordance with the
32 provisions of article three, chapter twenty-nine-a of
33 this code, to govern the disbursement of moneys from
34 the fund, establish a state deficient dams rehabilitation
35 assistance program to direct the distribution of loans
36 from the fund, establish criteria for eligibility to receive
37 loans from the fund and establish the terms and
38 conditions of the loans, including interest rates and
39 repayment terms. The secretary may initially
40 promulgate rules or amendments to rules as emergency
41 rules pursuant to the provisions of said article.

42 (d) The secretary and the authority may employ
43 qualified officers, agents, advisors and consultants and
44 other persons necessary to carry out the administration
45 and management of the fund.

46 (e) The authority shall propose rules for legislative
47 approval in accordance with the provisions of article
48 three, chapter twenty-nine-a of this code to govern the
49 pledge of loans to secure bonds of the authority.

50 (f) Disbursements from the fund shall be authorized
51 for payment in writing by the director of the authority
52 or the director's designee. Moneys in the fund shall not
53 be commingled with other money of the authority.

**§22-14-20. Dam Safety Rehabilitation Revolving Fund
program.**

1 (a) The secretary shall develop a state list of deficient
2 dams using a priority ranking system based on factors
3 designed by the secretary. Only dams on the list of
4 deficient dams are eligible for a loan from the Dam
5 Safety Rehabilitation Revolving Fund.

6 (b) The secretary shall develop an application,
7 including eligibility requirements for persons applying
8 for loans to correct or remove deficient dams. The
9 eligibility requirements shall include, at a minimum,
10 that the:

11 (1) Dam is on the list of deficient dams;

12 (2) Person is in a state of readiness to proceed to
13 planning, design or construction and expend loan
14 payments in a timely manner;

15 (3) Person has demonstrated the ability to repay the
16 loan; and

17 (4) Person is in compliance with section five of this
18 article.

19 (c) A person who owns an interest in a deficient dam
20 on the list of deficient dams may apply to the
21 department for a loan from the fund on forms designed
22 and approved by the secretary.

23 (d) Following approval by the secretary of the
24 application for a loan and a determination by the
25 secretary and the authority that moneys are available
26 for a loan, the secretary may direct the authority to
27 enter a loan agreement with the person submitting the
28 approved application.

29 (e) At the direction of the department pursuant to
30 subsection (d) of this section, the authority shall enter
31 into a loan agreement with a person approved for a
32 loan. The loan agreement is binding under the laws of
33 West Virginia and shall contain provisions as required

34 by the secretary, including:

35 (1) The cost of the project, the amount of the loan and
36 the terms of repayment of the loan and the security for
37 the loan which may include a deed of trust or other
38 appropriate security instrument creating a lien on the
39 project or any other collateral the secretary may
40 require;

41 (2) The specific purposes for which the proceeds of the
42 loan are required to be expended, the procedures as to
43 the disbursement of loan proceeds including an
44 estimated monthly draw schedule and the duties and
45 obligations imposed upon the applicant in regard to the
46 acquisition or construction of the project;

47 (3) The agreement of the applicant to repay the
48 obligations of the applicant under the loan agreement,
49 including provisions that revenue may be pledged for
50 the repayment of the loan together with all interest, fees
51 and charges on the loan and all other financial
52 obligations of the applicant under the loan agreement;

53 (4) If notes or other interim obligations are being
54 issued by the applicant, the agreement of the applicant
55 to take other repayment actions that are required of the
56 applicant under the loan agreement;

57 (5) The agreement of the applicant to accept the
58 authority's enforcement remedies pursuant to section
59 twenty-one of this article in the event of any default
60 under the loan; and

61 (6) The agreement of the applicant to comply with all
62 applicable federal and state statutes and rules and

63 regulations and all applicable local ordinances
64 pertinent to the financing, acquisition, design,
65 construction, operation, maintenance and use of the
66 project.

67 (f)(1) If the secretary assumes full charge and
68 responsibility over a dam pursuant to section
69 twenty-two of this article, and seeks to expend money
70 from the fund for the purpose of repairing or removing
71 a dam or taking other remedial action, the secretary
72 shall, prior to seeking a requisition from the fund,
73 provide the authority with the following information:

74 (A) The location of the dam;

75 (B) The owners of the dam; and

76 (C) The maximum amount estimated for repairing or
77 removing the dam or taking other remedial action.

78 (2) The authority shall then determine whether
79 sufficient moneys are available to satisfy the maximum
80 amount estimated for the dam and still meet all loan
81 obligations of the fund.

82 (g) The obligation of the authority to enter into loan
83 agreements is conditioned on the availability of moneys
84 in the fund in amounts and on terms and conditions as,
85 at the direction of the secretary, will enable the
86 authority to make loans.

87 (h) The ability of the secretary to use moneys in the
88 fund pursuant to section twenty-two of this article is
89 conditioned upon the availability of moneys in the
90 fund.

§22-14-21. Collection of money due to the fund.

1 (a) In order to ensure the timely payment of all sums
2 due and owing to the fund under a revolving fund loan
3 agreement between the state and a person, and
4 notwithstanding any provisions of this code to the
5 contrary, the authority has and may, at its option,
6 exercise the following rights and remedies in the event
7 of any default under a loan agreement:

8 (1) The authority may directly impose, in its own
9 name and for its own benefit, service charges upon all
10 users of a project funded by a loan distributed pursuant
11 to this article and may proceed directly to enforce and
12 collect service charges, together with all necessary costs
13 of the enforcement and collection;

14 (2) The authority may exercise, in its own name or in
15 the name of and as the agent for a person, all of the
16 rights, powers and remedies of the person with respect
17 to the project or which may be conferred upon the
18 person by statute, rule, or judicial decision, including
19 all rights and remedies with respect to users of the
20 project funded by the loan distributed to that person
21 pursuant to this article; and

22 (3) The authority may, by civil action, mandamus or
23 other judicial or administrative proceeding, compel
24 performance by a person of all of the terms and
25 conditions of the loan agreement, including:

26 (A) The adjustment of service charges as required to
27 repay the loan or otherwise satisfy the terms of the loan
28 agreement;

29 (B) The enforcement and collection of service charges;
30 and

31 (C) The enforcement of all rights and remedies
32 conferred by statute, rule, regulation or judicial
33 decision, including, but not limited to, all rights
34 associated with a security or other interest in real or
35 personal property with the right to foreclose upon a
36 default under a loan agreement.

37 (b) The rights and remedies enumerated in this
38 section are in addition to rights and remedies conferred
39 upon the authority by law or pursuant to the loan
40 agreement.

**§22-14-22. Authority of Department of Environmental
Protection for deficient dams that are
privately owned by a noncompliant dam
owner.**

1 (a) The secretary may assume full charge and
2 responsibility over a dam and may expend money from
3 the Dam Safety Rehabilitation Revolving Fund for the
4 purpose of repair or removal of the dam or other
5 remedial action, if:

6 (1) The dam is a deficient dam;

7 (2) The dam is privately owned; and

8 (3) The owner is a noncompliant dam owner.

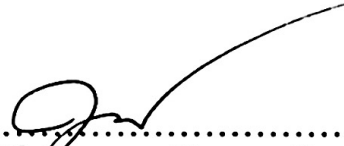
9 (b) All costs incurred by the secretary to repair or
10 remove the dam or take other remedial action shall be
11 promptly repaid by the owner upon request or, if not

12 repaid, the secretary may recover costs and damages
13 from the owner by appropriate civil action. Moneys
14 obtained from the civil action shall be promptly
15 deposited in the fund.

Enr. Com. Sub. for S. B. No. 467 18

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


.....
Chairman Senate Committee

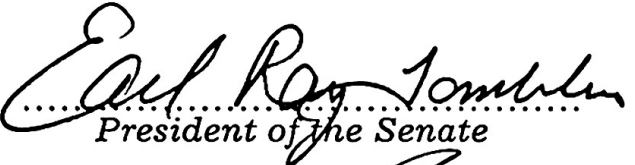

.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.


.....
Clerk of the Senate


.....
Clerk of the House of Delegates


.....
President of the Senate


.....
Speaker House of Delegates

The within *is appended* this
the *1st* Day of *April*, 2008.


.....
Governor

PRESENTED TO THE
GOVERNOR

MAR 26 2008

Time 10:05am