WEST VIRGINIA LEGISLATURE
SEVENTY-EIGHTH LEGISLATURE
REGULAR SESSION, 2008

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.]
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.

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 that may affect its safety to be determined by the secretary.

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

(c) "Appurtenant works" means any structure or facility that 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) "Authority" means the Water Development Authority provided in section four, article one, chapter twenty-two-c of this code.

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

(f)(1) "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:

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

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

(2) "Dam" does not mean:

(A) Any dam owned by the federal government;
(B) Any dam for which the operation and maintenance of the dam is the responsibility of the federal government;

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

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

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

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

(i) "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.

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

(k) "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 or country; the State of West Virginia; any state governmental agency; any political subdivision of the state or of its counties or municipalities; a sanitary district; a public service district; a drainage district; a conservation district; a watershed improvement district; a partnership, trust, or estate; a person or individual; a group of persons or individuals acting individually or as a group; or any other legal entity. The term "person", when used in this article, includes and refers 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.

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

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

(n) "Natural Resources Conservation Service" means
the Natural Resources Conservation Service of the United States Department of Agriculture or any successor or predecessor agency, including the Soil Conservation Service.

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

(p) "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.

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

(a) Any person who violates any provision of this article, any certificate of approval or any rule, notice or order issued pursuant to this article is subject to a civil administrative penalty, to be levied by the secretary, of not more than five thousand dollars for each day the violation continues, not to exceed a maximum of twenty thousand dollars. In assessing any penalty, the secretary shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements as well as any other appropriate factors as may be established by rules proposed by the secretary for legislative approval pursuant to article three, chapter twenty-nine-a of this code. No assessment may be levied pursuant to this subsection until after the alleged violator has been notified by certified mail or personal service. The notice shall include a reference to the section of the statute, rule, notice, order or statement of the certificate of approval's terms that was allegedly violated, a
concise statement of the facts alleged to constitute the violation, a statement of the amount of the civil administrative penalty to be imposed and a statement of the alleged violator's right to an informal hearing. The alleged violator has twenty calendar days from receipt of the notice within which to deliver to the secretary a written request for an informal hearing. If no hearing is requested, the notice becomes a final order after the expiration date of the twenty-day period. If a hearing is requested, the secretary shall inform the alleged violator of the time and place of the hearing. Within thirty days following the informal hearing, the secretary shall issue and furnish to the violator a written decision, and the reasons for the decision, concerning the assessment of a civil administrative penalty. The authority to levy a civil administrative penalty is in addition to all other enforcement provisions of this article and the payment of any assessment does not affect the availability of any other enforcement provision in connection with the violation for which the assessment is levied: Provided, That no combination of assessments against a violator shall exceed twenty thousand dollars per day of each violation: Provided, however, That any violation for which the violator has paid a civil administrative penalty assessed under this subsection is not subject to a separate civil penalty action under this article to the extent of the amount of the civil administrative penalty paid. Civil administrative penalties shall be levied in accordance with the rules promulgated under the authority of section four of this article. The net proceeds of assessments collected pursuant to this subsection shall be deposited in the dam safety fund established pursuant to section eighteen of this article. Any person adversely affected by the assessment of a
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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
violation or noncompliance exists or is taking place. The court or the judge thereof in vacation may issue a temporary or preliminary injunction in any case pending a decision on the merits of any injunctive application filed. In seeking an injunction, it is not necessary for the secretary to post bond or to allege or prove at any stage of the proceeding that irreparable damage will occur if the injunction is not issued or that the remedy at law is inadequate. An application for injunctive relief or a civil penalty action under this section may be filed and relief granted notwithstanding the fact that all administrative remedies provided in this article have not been exhausted or invoked against the person or persons against whom the relief is sought.

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

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

(e) In any action brought pursuant to the provisions of this section, the state or any agency of the state which prevails may be awarded costs and reasonable attorney's fees.
§22-14-19. Dam Safety Rehabilitation Revolving Fund established; disbursement of fund moneys.

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

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

(c) The secretary, in consultation with the authority,
shall promulgate rules, in accordance with the provisions of article three, chapter twenty-nine-a of this code, to govern the disbursement of moneys from the fund, establish a state deficient dams rehabilitation assistance program to direct the distribution of loans from the fund, establish criteria for eligibility to receive loans from the fund and establish the terms and conditions of the loans, including interest rates and repayment terms. The secretary may initially promulgate rules or amendments to rules as emergency rules pursuant to the provisions of said article.

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

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

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

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

(a) The secretary shall develop a state list of deficient dams using a priority ranking system based on factors designed by the secretary. Only dams on the list of deficient dams are eligible for a loan from the Dam Safety Rehabilitation Revolving Fund.
(b) The secretary shall develop an application, including eligibility requirements for persons applying for loans to correct or remove deficient dams. The eligibility requirements shall include, at a minimum, that the:

1. Dam is on the list of deficient dams;
2. Person is in a state of readiness to proceed to planning, design or construction and expend loan payments in a timely manner;
3. Person has demonstrated the ability to repay the loan; and
4. Person is in compliance with section five of this article.

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

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

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

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

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

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

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

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

(6) The agreement of the applicant to comply with all 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.

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

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

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

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

(A) The adjustment of service charges as required to repay the loan or otherwise satisfy the terms of the loan agreement;
(B) The enforcement and collection of service charges;
and

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

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

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

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

1. The dam is a deficient dam;
2. The dam is privately owned; and
3. The owner is a noncompliant dam owner.

(b) All costs incurred by the secretary to repair or
remove the dam or take other remedial action shall be
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.
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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 approved this the Day of , 2008.

Governor
PRESENTED TO THE GOVERNOR
MAR 26 2008
Time 10:05AM