

The National Dam Safety Program

Model State Dam Safety Program

FEMA 316/July 2007



Federal Emergency Management Agency
www.fema.gov

Association of State Dam Safety Officials
www.damsafety.org

TABLE OF CONTENTS

ACKNOWLEDGMENTS	i
INTRODUCTION	iii
CHAPTER I..... LEGISLATION AND REGULATIONS	1
CHAPTER II..... PERMITTING/APPROVAL OF PLANS/AUTHORIZATION TO IMPOUND	6
CHAPTER III..... INSPECTIONS AND SAFETY EVALUATIONS	10
CHAPTER IV	16
ENFORCEMENT	
CHAPTER V	18
EMERGENCY RESPONSE	
CHAPTER VI	20
PROGRAM STAFFING AND FUNDING	
CHAPTER VII	25
PROGRAM STAFF AND DAM OWNER-EDUCATION AND TRAINING	
CHAPTER VIII	28
DAM SAFETY PROGRAM - PUBLIC RELATIONS PLAN	
GLOSSARY OF TERMS.....	35
APPENDIX A	38
MODEL STATE LAW	
APPENDIX B	
EXAMPLE PERMIT REQUIREMENTS	
APPENDIX C	
SAMPLE INSPECTION CHECKLIST	
APPENDIX D	
PENALTIES FOR VIOLATIONS	
APPENDIX E	

SAMPLE EMERGENCY ACTION PLANS

APPENDIX F
ORGANIZATIONAL CHARTS

APPENDIX G
TRAINING COURSES AND TECHNICAL GUIDES

APPENDIX H
SAMPLE DATABASE FIELDS

APPENDIX I
BUDGET PREPARATION

APPENDIX J
PUBLIC OUTREACH TOOL SAMPLES

APPENDIX K
SAMPLE FEE STRUCTURES

CHAPTER IV - ENFORCEMENT

In order to ensure that dams* function safely, the regulatory agency* must be able to enforce its dam safety statutes and corresponding regulations quickly, uniformly and fairly. Such enforcement authority may be addressed specifically within the dam safety legislation and regulations, within general state enforcement procedures, or within a combination of these two authorities. Each state's enforcement program will be greatly affected by influences outside the dam safety program if the enforcement authority is not clear, concise and evenly practiced. This chapter will address what is needed in order to accomplish the enforcement task effectively. The following general components are addressed:

- enforceable statutes and regulations;
- authority for inspection and enforcement;
- clearly defined and responsive administrative procedures; and
- appropriate penalties.

I. Enforceable Statutes and Regulations

It is important that the laws that govern dam safety in a state be readily enforceable. To ensure that a state's laws are enforceable, it is recommended that they:

- A. Be clearly written and understandable;
- B. Be logistically plausible. They must not contradict other statutes within that state;
- C. Must include clauses that will allow for penalties in the event of infractions of the law; and
- D. Be constitutionally valid within the state.

The most effective way for these conditions to occur is to assure the fullest involvement of an agency's or state's legal counsel in the drafting and review of proposed statutes. Most state agencies must follow a set procedure within the agency for the drafting and review of legislation originating from within the agency. In the event the legislation does not originate from within the agency, the agency must provide as much technical guidance for the legislation as can be achieved and recommend changes as appropriate. The agency should establish a position on the passage of any piece of legislation affecting the dam safety statutes.

II. Clearly Defined Administrative Procedures

An essential feature of any enforcement program is clear and well defined procedures that is to be followed by the agency and its personnel. Without a clear delineation of responsibilities it is impossible for a state dam safety agency to enforce the statutes of the state. Additionally, there must be a defined appeals process for any person* who is adversely affected by an enforcement action of the state. This process must be conveyed to the affected party at the same time the action is taken. This process is usually set out in the state administrative procedures act.

The following section is organized to describe a possible process for enforcement:

- A. For most state agencies, the enforcement process will actually begin with inspection. Through the inspection process, problems, violations and inadequacies are found, recorded and reported. On-site inspections are the single most important means by which an agency can determine the level of compliance by dam owners in the maintenance and operation of their dam. On-site inspections provide the agency, on a regularly recurring basis, with an opportunity to evaluate the safety of a dam; and
- B. If a problem, violation, or inadequacy is found, a determination must be made whether or not an emergency exists. If the problem, violation, or inadequacy also constitutes an emergency, the emergency situation must be resolved before enforcement procedures begin. A non-emergency problem, violation, or inadequacy should result in a request from the agency for compliance by the owner. If an owner does not comply when requested or when a violation exists, an enforcement order must be issued which could be appealed by the dam owner. If the owner still refuses to comply, legal action must be initiated for compliance. Sometimes, the ultimate resolution to a violation or non-compliance problem is the evacuation of the reservoir and breaching of the dam by the owner or the state.

III. Penalties

Just as there is a set of actions which the state can pursue when a violation is identified, there must be a set of penalties that adequately deter violations. These penalties must be properly and clearly addressed in the dam safety statutes.

In the course of any enforcement program, there will be violations discovered which are of lesser severity than others. It should be expected that many of these violations can be disposed of in ways not involving formal hearings or

litigation, such as consent orders. However, there will also be a certain number of violations which will require a more rigorous enforcement procedure, including the state's attempt to assess civil and/or criminal penalties. These penalties may include incarceration and/or monetary judgments. Any monetary judgment should cover the cost of the enforcement procedure and penalize the owner.

Appendix D includes examples of enforcement procedures.

IV. Emergency Situations

It is imperative that the regulatory agency have clear authority to take emergency actions in life-threatening situations and that those actions remain in force until the emergency is resolved. Emergency actions can include measures for protection of life and property, lowering the reservoir level, and removal* of all or part of the dam and impoundment. Statutory authority should give the state the right to recover any costs for emergency actions from the owner of the dam by legal action in a court of appropriate jurisdiction where the dam is located or where the owner resides.

APPENDIX D

PENALTIES FOR VIOLATIONS

CASE 1: PENNSYLVANIA

APPENDIX D
PENALTIES FOR VIOLATIONS
CASE 1 : PENNSYLVANIA

Section 19. Civil Remedies.

(a) Any activity or condition declared by this act to be unlawful conduct shall be restrained or prevented in the manner provided by law or equity for abatement of public nuisances, and the expense thereof shall be recoverable from the violator in such manner as may now or hereafter be provided by law.

(b) In addition, suits to restrain or prevent any unlawful conduct as defined in this act or to compel action to discontinue any unlawful conduct may be instituted in equity or at law in the name of the Commonwealth upon relation of the Attorney General, or upon relation of any district attorney of any county or upon relation of the solicitor of any municipality affected after 30 days notice has first been served upon the Attorney General of the intention of the district attorney or solicitor to proceed. Such proceedings may be prosecuted in the Commonwealth Court, or in the court of common pleas of the county where the activity has taken place, the dam, water obstruction or encroachment is maintained or the public is affected, and to that end jurisdiction is hereby conferred in law and equity upon such courts: Provided, That except in cases of emergency where, in the opinion of the court, the exigencies of the cases require immediate abatement of said unlawful conduct, the court may, in its decree, fix a reasonable time during which the person responsible for the unlawful conduct may make provision of the same. The expense of such proceedings shall be recoverable from the violator in such manner as may now or hereafter be provided by law.

Section 20. Enforcement Orders.

(a) The Department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. Such orders shall include, but shall not be limited to, orders modifying, suspending or revoking permits and orders requiring persons to cease any activity which is in violation of the provisions of this act. Such an order may be issued if the Department finds that a person is in violation of any provision of this act, or any rule or regulation issued hereunder. The Department may, in its order, require compliance with such terms and conditions as are necessary to effect the purposes of this act.

(b) An order issued under this section shall take effect upon notice, unless the order specifies otherwise.

(c) Any person violating or failing to comply with any order of the Department from which no appeal has been taken or which has been sustained on appeal, or which has been appealed but where no supersedeas has been

granted for the period in which the order has been violated shall be deemed to be in contempt of such order. Upon petition and certification of such order by the Department or the hearing board, the Commonwealth Court or the court of common place of the county where the unlawful conduct occurred or is occurring, shall, if it finds, after hearing or otherwise, that the respondent is not in compliance with the order, adjudge the respondent in contempt of the order and shall assess civil penalties of an amount not less than \$100 nor greater than \$10,000 per violation plus \$500 or each continuing day of violation. Where the respondent has not as of the date of hearing before the court complied with the order of the Department or board, the court shall specifically order the respondent to immediately and fully comply with such order, and may issue any further order as, may be appropriate.

(d) The right of the Department to issue an order under this section is in addition to any penalty which may be imposed or any action taken pursuant to this act. The failure to comply with any such order is hereby declared to be unlawful conduct and a nuisance.

Section 21. Civil Penalties.

(a) In addition to proceeding under any other remedy available at law or equity for :

(1) a violation of a provision of this act or any rule or regulation issued hereunder;

(2) a violation of any order of the Department ; or

(3) engaging in any unlawful conduct of the provisions of this act the hearing board, in an action instituted before it by the Department, may assess a civil penalty upon any person for such violation or unlawful conduct. Such a penalty may be assessed whether or not the violation was willful. The civil penalty so assessed shall not exceed \$10,000, plus \$500 for each day of continued violation. In determining the amount of the civil penalty, the board shall consider the willfulness of the violation, damage or injury to the stream regimen and downstream areas of the Commonwealth, cost of restoration, the cost to the Commonwealth of enforcing the provisions of the act against such person, and other relevant factors. The assessment of the civil penalty shall be made after hearing, unless hearing is specifically waived by the respondent.

(b) Civil penalties shall be payable to the Commonwealth and shall be collectible in any manner provided by law for the collection of debts. If any person liable to pay any such penalty neglects or refuses to pay the same after demand, the amount, together with interest and any costs that may accrue, shall be a lien in favor of the Commonwealth upon the property, both real and personal, of such

person but only after the amount of the lien has been entered and docketed of record by prothonotary of the county where the property is situated. The board may, at any time, transmit to the protonotaries of the respective counties certified copies of all such liens, and it shall be the duty of each prothonotary to enter and docket the same of record in his office, and to index the same as judgments are indexed, without requiring the payment of costs as a condition precedent to the entry thereof.

(c) Any officer of any corporation, association, municipality or county, who knowingly, willfully, recklessly or with gross negligence engages in or authorizes unlawful conduct as defined in this act shall be subject to the imposition upon civil penalties in accordance with subsection (a). Any civil penalty imposed upon such officer shall be in addition to and separate from any civil penalty imposed upon the corporation, association, municipality or county. Nothing in this subsection shall be construed to affect the liability or duty of any officer of a corporation, association, municipality or county for the purposes of criminal penalties imposed under this act, or for the purposes of any other rights or remedies now or hereafter existing or herein provided.

Section 22. Criminal Penalties.

(a) Any person who engages in unlawful conduct as defined in this act is guilty of a summary offense and, upon conviction, shall be sentenced to pay a fine of not less than \$100 nor more than \$1,000 for each separate offense, and, in default of the payment of such fine, to imprisonment for a period of not more than 60 days.

(b) Any person who, within two years after a conviction in a summary proceeding as provided in subsection (a) engages in unlawful conduct as defined in this act is guilty of a misdemeanor of the third degree and, upon conviction, shall be sentenced to pay a fine of not less than \$500 nor more than \$5,000 for each separate offense or to imprisonment for a period of not more than one year, or both.

(c) Each day of continued violation of any provision of this act or any rule or regulation or order of the Department issued pursuant to this act shall constitute a separate offense under subsections (a) and (b). Some states may find it advisable to add a provision for injunctive relief (i.e., a court order to repair or breach a dam).

Section 23. Summary proceedings.

All summary proceedings under the provisions of this act may be brought before any magistrate, alderman, or justice of the peace of the county where the unlawful conduct has occurred or the dam, water obstruction or encroachment is maintained, or the public affected, and to that end jurisdiction is hereby conferred

upon said magistrates, aldermen or justices of the peace, subject to appeal by either party in the manner provided by law. In the case of any appeal from any such conviction in the manner provided by law for appeals from summary conviction, it shall be the duty of the district attorney of the county to represent the interests of the Commonwealth.

Section 24. Administrative and judicial review.

(a) Any person who shall be aggrieved by any action of the Department under this act shall have the right within 30 days of receipt of notice of such action to appeal to the Environmental Hearing Board. Any appeal of a general permit issued pursuant to section 7 shall be filed within 30 days of the date of publication of the general permit in the Pennsylvania Bulletin. Hearings under this subsection any subsequent appeal shall be in accordance with section 1921 (a) of the act of April 9, 1929 (P .L . 177, No . 175), known as " The Administrative Code of 1929", and the " Administrative Agency Law".

(b) An appeal to the hearing board of any action of the Department shall not act as a supersedeas. A supersedeas may be granted by the hearing board upon a showing by the petitioner:

(1) the irreparable harm to the petitioner or other interested parties will result if the supersedeas is denied;

(2) that there is a likelihood of the petitioner's success on the merits; and

(3) that the grant of a supersedeas will not result in irreparable harm to the Commonwealth. The board may grant such a supersedeas subject to such security as it may deem proper.

Section 25. Preservation of existing rights and remedies.

The collection of any penalty under the provisions of this act shall not be construed as estopping the Commonwealth, or any district attorney or solicitor of a municipality, from proceeding in courts of law or equity to abate conduct forbidden under this act, or abate nuisances under existing law. It is hereby declared to be the purpose of this act to provide additional and cumulative remedies to abate unsafe dams, water obstructions or encroachments in this Commonwealth, and nothing in this act shall in any way abridge or alter rights of action or remedies now or hereafter existing in equity, or under the common law or statutory law, criminal or civil, nor shall any provision in this act, or the granting of any permit under this act, or any act done by virtue of this act, be construed as estopping the Commonwealth, persons or municipalities, in the exercise of their rights under the common law or decisional law or in equity, from proceeding in

courts of law or equity to suppress nuisances, or to abate any unsafe dam now or hereafter existing, or enforce common law or statutory rights.

The division of penalties into several categories reflects the fact that in most cases penalties that follow violations will be different according to not only severity but also nature. That is, it should be possible to distinguish between civil violations and criminal violations of the law.

APPENDIX D

PENALTIES FOR VIOLATIONS

CASE 2: CALIFORNIA

Appendix D - Penalties for Violations
CASE 2: CALIFORNIA
Offenses and Punishment
(California 1995)

6425. Every person who violates any of the provisions of this part or of any approval, order, rule, regulation, or requirement of the department is guilty of a misdemeanor and punishable by a fine of not more than two thousand dollars (\$2, 000) or by imprisonment in the county jail not exceeding six months, or both. In the event of a continuing violation, each day that the violation continues constitutes a separate and distinct offense.

6426 . Any person who willfully obstructs, hinders, or prevents the department or its agents or employees from performing the duties imposed by this part or who willfully resists the exercise of the control and supervision conferred by this part upon the department or its agents or employees is guilty of a misdemeanor and punishable as provided in this article.

6427 . 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 construction, enlargement, repair, alteration, maintenance, or removal of any dam or reservoir, who knowingly does work or permits work to be executed on the dam or reservoir without an approval or in violation of or contrary to any approval as provided for in this part or any inspector, agent, or employee of the department who has knowledge of such work being done and who fails to immediately notify the department thereof is guilty of a misdemeanor and punishable as provided in this article.

6428 . Any owner who fails to pay any annual fee or any part of any annual fee required to be paid pursuant to Section 6307 within the time required shall pay a penalty of 10 percent of the annual fee or part of the annual fee, plus interest at the rate of one-half of 1 percent per month, or fraction thereof, from the date on which the annual fee or the part of the annual fee became due and payable to the state until the date of payment.

APPENDIX D

PENALTIES FOR VIOLATIONS

CASE 3: NORTH CAROLINA

Appendix D - Penalties for Violations
CASE 3: NORTH CAROLINA

(North Carolina 1994)

143-215 .36. Enforcement procedures.

(a) Criminal Penalties.

Any person who shall be adjudged to have violated this Article shall be guilty of a Class 3 misdemeanor and shall only be liable to a penalty of not less than one hundred dollars (\$100 .00) nor more than one thousand dollars (\$1,000) for each violation. In addition, if any person is adjudged to have committed such violation willfully, the court may determine that each day during which such violation continued constitutes a separate violation subject to the foregoing penalty.

(b) Civil Penalties.

(1) The Secretary may assess a civil penalty of not less than one hundred dollars (\$100 .00) nor more than five hundred dollars (\$500 .00) against any person who violates any provisions of this Part, a rule implementing this Part, or an order issued under this Part.

(2) If any action or failure to act for which a penalty may be assessed under this Part is willful, the Secretary may assess a penalty not to exceed five hundred dollars (\$500 .00) per day for each day of violation.

(3) In determining the amount of the penalty, the Secretary shall consider the factors set out in G .S . 143B-282 .1(b). The procedures set out in G .S . 143B-282 .1 shall apply to civil penalty assessments that are presented to the Commission for final agency decision.

(4) The Secretary shall notify any person assessed a civil penalty of the assessment and the specific reasons therefor by registered or certified mail, or by any means authorized by G .S . 1A-1, Rule 4. Contested case petitions shall be filed in accordance with G .S .150B-23 within 30 days of receipt of the notice of assessment.

(5) Requests for remission of civil penalties shall be filed with the Secretary. Remission requests shall not be considered unless made within 30 days of receipt of the notice of assessment. Remission requests must be accompanied by a waiver of the right to a contested case hearing pursuant to Chapter 150B and a stipulation of the facts on which the

assessment was based. Consistent with the limitations in G .S . 143B-282 .1(c) and G .S. 143-282 .1(d), remission requests may be resolved by the Secretary and the violator. If the Secretary and the violator are unable to resolve the request, the Secretary shall deliver remission requests and his recommended action to the Committee on Civil Penalty Remissions of the Environmental Management Commission appointed pursuant to G .S . 143B-282 .1(c).

(6) If any civil penalty has not been paid within 30 days after notice of assessment has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment, unless the violator contests the assessment as provided in subdivision (4) of this subsection. If any civil penalty has not been paid within 30 days after the final agency decision or court order has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment. A civil action shall be filed within three years of the date the final agency decision was served on the violator.

(7) The Secretary may delegate his powers and duties under this section to the Director of the Division of Land Resources of the Department.

(c) Injunctive Relief. - Upon violation of any of the provisions of this Part, a rule implementing this Part, or an order issued under this Part, the Secretary may, either before or after the institution of proceedings for the collection of the penalty imposed by this Part for such violations, request the Attorney General to institute a civil action in the superior court of the county or counties where the violation occurred in the name of the State upon the relation of the Department for injunctive relief to restrain the violation or require corrective action, and for such other or further relief in the premises as said court shall deem proper. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this Part for any violation of the same. (1967, c . 1068, s . 14 ; 1973, c . 1262, s . 23 ; 1975, c . 842, s . 3 ; 1977, c . 771, s . 4 ; 1987, c . 827, ss . 154, 180 ; 1989 (Reg . Sess., 1990), c . 1036, s . 5 ; 1991, c . 342, ss . 10, 11 ; 1993, c . 394, s . 9 ; c . 539, s . 1021 ; 1994, Ex . Sess ., c . 24, s . 14(c) .)