



# VIRGINIA DAM SAFETY PROGRAM ENFORCEMENT MANUAL

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Guidance Adopted September 7, 2016 (DCR-VSWCB-041)

This document will remain in effect until rescinded or superseded.

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Daphne W. Jamison  
**Board Chair**

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Clyde E. Cristman  
**DCR Director**

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## **PART I. OVERVIEW OF ENFORCEMENT PROGRAM**

### **INTRODUCTION**

The purpose of the Dam Safety Enforcement Manual is to provide the Department of Conservation and Recreation (DCR) staff with guidance for enforcing the Virginia Dam Safety Program pursuant to the Virginia Dam Safety Act and the Virginia Impounding Structure Regulations (Regulations). The Manual also helps dam owners and other interested persons to understand how DCR enforces the Virginia Dam Safety Program. The guidance in the Manual does not carry the force of law; it is intended to provide a framework for ensuring fair and consistent enforcement of the Virginia Dam Safety Program throughout the Commonwealth.

This Manual is not intended and cannot be relied on to create any rights, substantive or procedural, on the part of any person or entity. DCR reserves the right to modify this guidance at any time without public notice. In addition, DCR may deviate from this guidance as it deems necessary to carry out the intent of the Virginia Dam Safety Act and Regulations.

The Manual comprises three parts. Part I is an overview of the enforcement process. Part II generally describes how the process works and refers the reader to the appropriate guidelines for implementing each part of the enforcement process as well as providing a flowchart illustrating the stages in the enforcement process. The Manual's Appendices include guidelines for implementing specific parts of the enforcement process.

### **I.1. Mission and Purpose**

The Virginia Dam Safety Program's mission is to protect the lives and property of the Commonwealth's citizen's from natural and manmade flooding.<sup>1</sup> The purpose of the enforcement process is to fulfill the Program's mission by ensuring that regulated dams are operated and maintained in compliance with the Virginia Dam Safety Act and Virginia Impounding Structure Regulations and that any unsafe conditions that may threaten life or property are corrected and removed in accordance with the Act and Regulations.<sup>2</sup>

### **I.2. Scope of Enforcement Actions**

The Virginia General Assembly enacted the Virginia Dam Safety Act which confers upon the Soil and Water Conservation Board (Board) the duty to enforce the Act and Regulations<sup>3</sup> and the power to take administrative enforcement actions and to seek judicial sanctions against violators.<sup>4</sup>

### **I.3. Nature of Enforcement Actions**

DCR enforcement actions in the Dam Safety Program will be timely, predictable, and include sanctions when appropriate. DCR recognizes that its goal of effective enforcement may be accomplished in most cases through informal means by offering compliance assistance to dam owners and working with them to ensure that any noncompliance is corrected. Nonetheless, DCR will use the full range of its enforcement authority as needed to deter violations and ensure that its mission to protect the lives and property of the Commonwealth's citizen's from natural and manmade flooding is fulfilled.

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<sup>1</sup> 4 VAC 50-20-20.A

<sup>2</sup> Va. Code § 10.1-604, et seq.

<sup>3</sup> Virginia Code § 10.1-60. The Virginia Impounding Regulations are codified at 4 VAC 50-60- et seq.

<sup>4</sup> Virginia Code §§ 10.1-60.

## **PART II. THE ENFORCEMENT PROCESS**

### **II.1. Role of the Virginia Soil and Water Conservation Board**

The Virginia Dam Safety Act confers upon the Board the power to take administrative and legal actions to enforce the Act's provisions and to ensure compliance.<sup>5</sup> At its December 11, 1991 meeting, the Board delegated to DCR by unanimous resolution all matters concerning inspections of dams and enforcement of the Virginia Dam Safety Program.<sup>6</sup> On September 7, 2016, the Board reaffirmed by unanimous motion the delegation of authority. The delegation does not remove the Board's authority to enforce the Act.

As a practical matter, the delegation means that DCR assumes primary responsibility for implementing the enforcement process described in Part II of this Manual with respect the Virginia Dam Safety Program. At the same time, the Board retains authority to enforce the Program, should it choose to do so. In addition, the Board may approve specific enforcement actions, issue Orders, or conduct hearings.

### **II.2. Administrative Enforcement**

DCR is responsible for ensuring that the regulated community complies with the Virginia Dam Safety Program requirements. To accomplish this responsibility, DCR monitors compliance at regulated dams and offers compliance assistance when needed.

The goal of compliance assistance is to help the dam owner to comply voluntarily. Toward that end, DCR provides education, training, and technical guidance. DCR works closely with dam owners to help them remove any unsafe conditions at the dam and comply with Program requirements. When compliance assistance is unsuccessful, DCR initiates the enforcement process.

The majority of DCR enforcement actions are resolved by DCR through the administrative enforcement process and do not require judicial action. Administrative enforcement actions may be resolved by using

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<sup>5</sup> Va. Code §§ 10.1-603.2:1 and – 603.2:1.3.

<sup>6</sup> Copies of the delegations of authority are included in Appendix A to this Manual. Pursuant to Va. Code § 10.1-605.1, the Board may delegate any of the powers and duties vested by the Virginia Dam Safety Act except for the adoption and promulgation of regulations. Delegation shall not remove from the Board authority to enforce the provisions of the Act.

either an informal or a formal process depending on the facts and circumstances of the particular case.

The administrative enforcement process described below is outlined in the Virginia Dam Safety Act and Regulations. The process is streamlined in order to achieve the greatest level of compliance possible within the regulated community of dam owners in the shortest time while making the best use of DCR's limited resources. Specific guidelines for implementing each part of the process are included in the manual's Appendices.

### **II.2.1. Informal Administrative Enforcement**

In an effort to leverage limited resources, DCR staff may exercise professional judgment regarding the circumstances surrounding an enforcement action and choose to resolve noncompliance informally. DCR staff works cooperatively with dam owners to solve complex compliance and enforcement problems.

As part of the informal enforcement process, DCR staff may conduct an initial informal enforcement meeting with dam owners to help them better understand their responsibilities with respect to the dam's care and maintenance and to those residents downstream of the dam. At the initial meeting, staff explains how the Virginia Dam Safety Program works including the Program's mission, purpose, and regulatory requirements. In addition, DCR staff discusses dam failures including how and why a dam failure happens, relevant compliance issues, and the enforcement process.<sup>7</sup>

By means of informal enforcement efforts, DCR staff seeks to find shared goals with dam owners and to negotiate resolutions that ensure regulated dams are returned to compliance in conformance with Virginia law and Program requirements. In the informal enforcement stage, DCR staff may ask that the dam owner voluntarily provide a written plan and schedule for removing unsafe conditions at the dam, and staff works with the owner to begin the process of meeting program requirements.

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<sup>7</sup> The Division Director, Enforcement Manager, Regional Engineer and other staff work as a team at the initial enforcement meeting to educate dam owners in understanding how the Program works.

## II.2.2. Formal Administrative Enforcement

Under circumstances where a dam owner does not or is unable to voluntarily comply with the requirements set forth in the Virginia Dam Safety Act and Regulations, the General Assembly has provided that DCR may undertake enforcement actions to bring the dam into compliance with the law. The Virginia Dam Safety Act outlines the enforcement process that DCR will undertake depending on the conditions at the dam.<sup>8</sup>

As an initial step in the enforcement process, DCR will discern the condition of the dam. DCR may use the dam's Annual Inspections Reports or other information in order to establish that the dam is operating in an unsafe condition.<sup>9</sup> Pursuant to the Act, a dam may be designated as unsafe if there are serious deficiencies in the dam's design, construction, or physical condition that if left unaddressed could result in loss of life or damage property or if the design, construction, operation, or maintenance of the dam is such that its expected performance during flooding conditions threatens its structural integrity.<sup>10</sup>

- **Unsafe dam presenting imminent danger**

If the unsafe dam presents an imminent danger and the owner does not take immediate action to correct the problem, the Governor has authority to take immediate, appropriate action, without a hearing, to remove the imminent danger. The Attorney General may bring an action against the owner of the impounding structure for recovering the Commonwealth's expenses in removing the danger.<sup>11</sup>

- **Unsafe dam presenting non-imminent danger**

It is more often the case that an unsafe dam presents a non-imminent danger that if not corrected could threaten life or property. In this circumstance, DCR may pursue administrative

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<sup>8</sup> Va. Code §§ 10.1-607 - 10.1-609.

<sup>9</sup> Va. Code § 10.1-607.

<sup>10</sup> Va. Code § 10.1-607.1.

<sup>11</sup> Va. Code § 10.1-608.



enforcement action to return the dam to compliance.<sup>12</sup>

- **Notice of Deficiency Report**

In the first stage of the formal administrative enforcement process, the Board issues a Notice of Deficiency Report to the dam owner with findings and recommendations for correcting the deficiencies that are creating the unsafe condition. The Notice of Deficiency Report also includes a schedule for correcting the deficiencies.<sup>13</sup>

- **Special Order**

If the dam owner fails to comply with the recommendations in the Board's Notice of Deficiency Report, the Report will serve as the basis for the next step in the administrative enforcement process, which is a Special Order issued by the DCR Director. The Special Order includes an account of the facts of the case, citations to applicable law, alleged violations, and an appended schedule of compliance for performing corrective actions.

In addition to requiring that the dam owner correct the dam's deficiencies, the Special Order may also require either that the water level in the impoundment be lowered or that the impoundment be drained of its contents until the unsafe condition is corrected. If necessary, the Director may cause the impoundment to be lowered or drained at the owner's expense.<sup>14</sup>

- **Civil penalties**

The formal administrative enforcement process is intended to result in a legally binding obligation on the part of the regulated party to comply with the law or submit to a sanction, or both. The Board has authority as part of the administrative enforcement process to assess civil penalties for violations of the Dam Safety Act up to \$500 per day not to exceed a maximum of \$25,000.<sup>15</sup>

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<sup>12</sup> Va. Code § 10.1-609.

<sup>13</sup> Va. Code § 10.1-609.

<sup>14</sup> Va. Code § 10.1-609.

<sup>15</sup> Va. Code § 10.1-613.2. Guidelines for assessing civil charges are in Appendix D of this Manual.

- **Injunctive relief**

Finally, under circumstances where a dam owner fails to comply with a Special Order, the Board may file a law suit seeking an injunction from a court against the dam owner to remove or modify the dam. If the owner does not comply with the injunction, the Board may implement the injunctive relief at the owner's expense.<sup>16</sup> See Section II.3.1 below.

### **II.3. Judicial Enforcement**

The Virginia Dam Safety Act provides for civil and criminal sanctions against violators.<sup>17</sup> The Board may choose to pursue violations of the Act and Regulations and any Board-issued Certificate or Order through the courts.

At the request of the Board or the Director, or both, the Office of the Attorney General of Virginia represents the Board, the Director, and DCR in any civil action to impose civil judicial sanctions.<sup>18</sup> It is the responsibility of the Office of the Commonwealth's Attorney to represent program authorities other than DCR, including the localities and the Soil and Water Conservation Districts.<sup>19</sup> In addition, the Commonwealth's Attorney may seek criminal judicial sanctions against violators of the Act and Regulations.

#### **II.3.1. Civil Judicial Enforcement**

Under the Virginia Dam Safety Act, the Board may seek injunctive relief<sup>20</sup> or civil penalties or both. Law suits seeking injunctive relief or civil penalties are filed a court of competent jurisdiction in the name of the Commonwealth.<sup>21</sup>

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<sup>16</sup> Va. Code § 10.1-613.

<sup>17</sup> Va. Code §§ 10- 613 and 10.1-613.1.

<sup>18</sup> Va. Code § 2.2-507 and § 10- 613.

<sup>19</sup> Va. Code § 2.2-507.A provides that "Upon the request of the local attorney for the Commonwealth, the Attorney General may provide legal service in civil matters for the soil and water conservation district directors or districts."

<sup>20</sup> An injunction is a judicial remedy requiring the person to whom it is directed to do or refrain from doing a particular thing.

<sup>21</sup> Va. Code § 10.613.

The Board may file suit to compel compliance with an Order issued by the Board (e.g., Special Order; temporary Stop Work Order) or seek an injunction against a dam owner, or other person or legal entity, enjoining any unlawful construction, modification, operation or maintenance of a dam. If the court orders that the dam be modified or removed, the dam owner must bear the expense to remove or modify the dam. If the owner does not comply with the injunction, the Board may implement the injunctive relief at the owner's expense.<sup>22</sup>

Should the Board be required to implement and carry out the action, the Board shall charge the owner for any expenses associated with the action, and if the repayment is not made within 90 days after written demand, the Board may bring an action in the proper court to recover this expense. The Board shall file an action in the court having jurisdiction over any owner or the owner's property for the recovery of such costs. A lien in the amount of such costs shall be automatically created on all property owned by any such owner at or proximate to such dam or reservoir.<sup>23</sup>

Guidelines for referring a case for civil judicial action to the Office of the Attorney are provided in Appendix G of this Manual.

### **II.3.2. Criminal Judicial Enforcement**

Under the Virginia Dam Safety Act, violators with the requisite criminal intent may be subject to serious criminal sanctions including penalties imposed by a court. Alleged violations may be prosecuted by the Commonwealth's Attorney in the locality where the alleged criminal act occurred.<sup>24</sup>

## **II.4. Virginia Administrative Process Act**

The Virginia Administrative Process Act<sup>25</sup> supplements the Virginia Act with procedures for adopting regulations, adjudicating or deciding cases

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<sup>22</sup> Va Code § 10.1-613.

<sup>23</sup> Va Code § 10.1-613.

<sup>24</sup> Va Code § 10.1-613.1.

<sup>25</sup> Va Code § 2.2-4000, *et seq.*

(e.g., making a decision on a certificate or permit application or an enforcement matter) and for judicial review of Agency action.<sup>26</sup>

When acting in an adjudicative or decision-making role with respect to enforcement matters, the Board may need to make a determination as to whether a regulated party is in violation of any law, regulation, or permit.<sup>27</sup> The Administrative Process Act defines this kind of determination as a case decision.<sup>28</sup> Case decisions are a necessary component of the enforcement process. The Special Order discussed in Section II.1.2 above is an example of a case decision.

The procedures applicable to making case decisions are intended to ensure that fair treatment is afforded to the regulatory community as guaranteed by the Constitution of Virginia.<sup>29</sup> To that end, the Administrative Process Act requires, among other things, that the decision-maker (*e.g.*, the Board or DCR) conduct an informal fact-finding proceeding or a formal hearing, depending on the circumstances, prior to issuing any case decision.<sup>30</sup> These proceedings allow the regulated party an opportunity to be heard before any decision is made affecting his or her interests.<sup>31</sup>

Typically, routine case decisions are made pursuant to an informal fact-finding proceeding. The Board may hold the proceeding on its own initiative or at the request of a party seeking the case decision (*i.e.*, the dam owner). The dam owner and the agency may agree to waive the informal fact-finding proceeding

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<sup>26</sup> The Administrative Process Act is, in turn, supplemented by the Virginia Supreme Court's procedural rules for judicial review of Agency action.

<sup>27</sup> Virginia's courts interpret this definition broadly to include any specific application by the government of facts to law.

<sup>28</sup> Virginia Code § 2.2 – 4001 defines “case or “case decision” to mean “any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.”

<sup>29</sup> Constitution of Virginia, Article I, Section 11, stating that “no person shall be deprived of his life, liberty, or property without due process of law.”

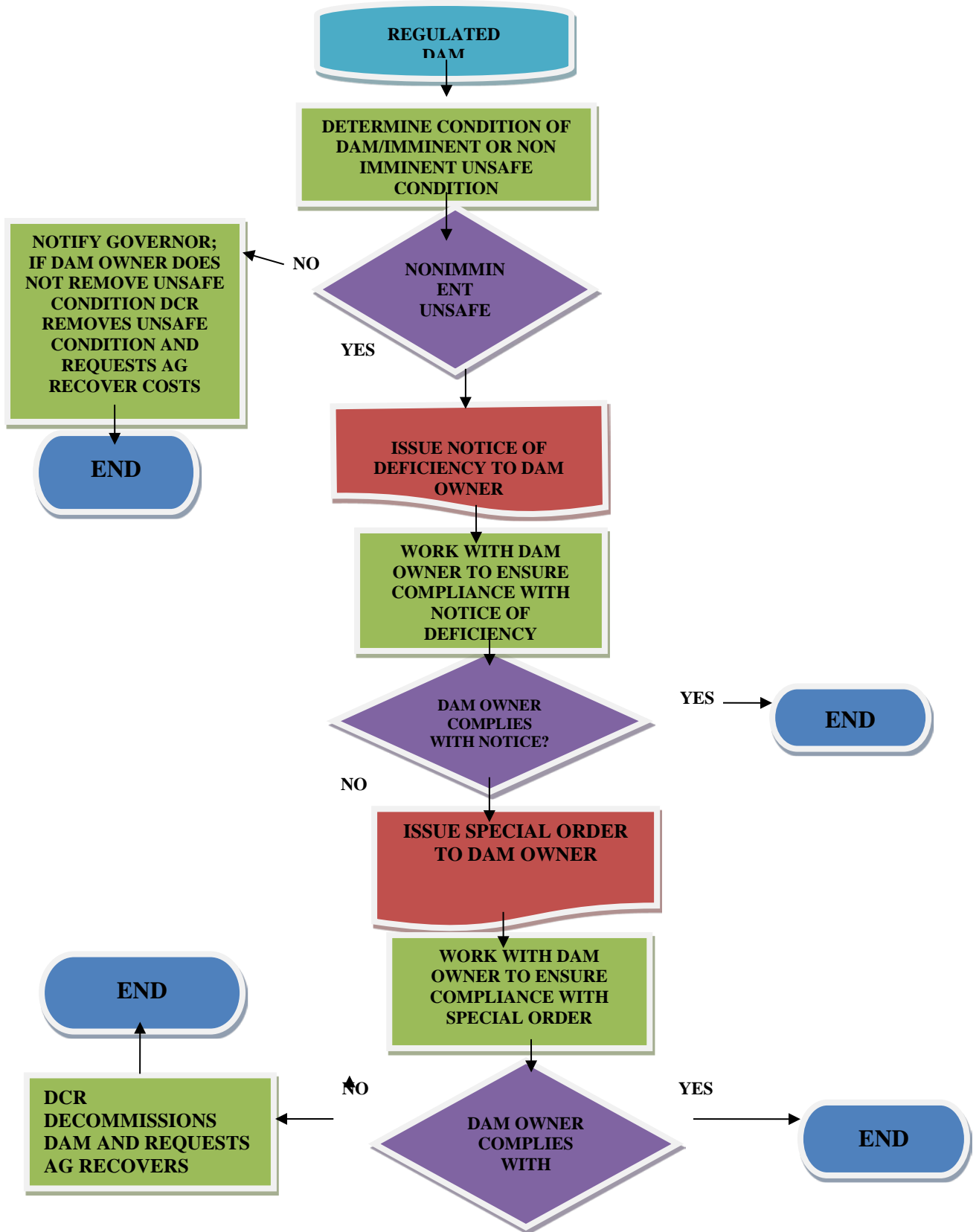
<sup>30</sup> Virginia Code §§ 2.2 -4019 and -4020.

<sup>31</sup> As noted above, the enforcement process is designed so that the majority of enforcement actions are resolved by consent and thus do not require an informal fact-finding proceeding or a formal hearing.

and go directly to a formal hearing. In either case, the proceeding is designed to enable the decision-maker to reach a fully-informed decision based on the facts and the law.

Guidelines applicable to informal fact-finding proceedings and an outline of the process for conducting an informal fact-finding proceeding are provided in Appendix E. Guidelines for conducting a formal hearing and outline of the process are included in Appendix F.

### Dam Safety Enforcement Flowchart



# Appendices

## Appendix A

### Delegations of Authority



**NOW, THEREFORE BE IT RESOLVED** that the Virginia Soil and Water Conservation Board hereby delegated to the Director of the Department of Conservation and recreation, or his designee, the authority to act in place of the Board in all matters concerning inspections of Dams and enforcement of the Dam Safety law and Regulations, accepting only the issuance of permits and certificates, the promulgation of regulations and the conduct of hearings.” [sic]

**Ex-Officio Alternates for 1992**

A motion was made by Mr. Copeland requesting Division staff send letters to ex-officio members to request their designated alternatives for 1991. The motion was seconded by Ms. Campbell and carried.

**NACD Annual Convention – Reno, Nevada, February, 1992**

Upon a motion made by Mr. Wells, seconded by Mr. Johnson and carried, Dr. Hancuff was appointed as a second representative from the Board to attend the national Association of Conservation Districts Annual Convention to Reno, Nevada, February 2-6, 1992. Chairman Townsend will also attend the convention.

**Other Business**

Mr. Wells advised that the Board had received an invitation to attend Agri-tech '92 July 9-10, 1992 in Blacksburg and made a motion that the Board hold its regular July meeting at the Blacksburg Marriott on July 8 in conjunction with Agri-Tech '92. The Motion was seconded by Mr. Johnson and carried.

Ms. Campbell made a motion that the Board endorse the Virginia Association of Soil and water Conservation Districts 1992-1994 Legislative Proposals for Conservation and Water Quality Programs which strongly supports the following five important programs the address the state's soil conservation and water quality concerns (1) Chesapeake Bay Basin Nonpoint Source Pollution Control, (2) Outside Chesapeake Bay Basin Nonpoint Source Pollution Control, (3) Soil Survey Mapping, (4) Flood Protection Fund, (5) Flood Control Structures. The motion was seconded by Mr. Copeland and carried.

The next meeting of the Virginia Soil and Water Conservation Board will be held at 9:00 a.m., Thursday, January 16, 1992 at the Colonial Farm Credit office Building in Mechanicsville, Virginia.

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VIRGINIA SOIL AND WATER CONSERVATION BOARD

November 18, 2010 Meeting

In Senate Room A in the General Assembly Building  
Richmond, Virginia

**Motion for the Board to authorize the Director of the Department of Conservation and Recreation or his designee to issue Impounding Structure Construction Permits and Alteration Permits in accordance with § 10.1-605.1 of the Code of Virginia.**

In accordance with § 10.1-605.1 of the Dam Safety Act (Delegation of powers and duties), "[t]he Board may delegate to the Director or his designee any of the powers and duties vested in the Board by this article, except the adoption and promulgation of regulations or the issuance of certificates. Delegation shall not remove from the Board authority to enforce the provisions of this article."

Pursuant to this authority, the Virginia Soil and Water Conservation Board delegates the power and duty to issue Construction Permits and Alteration Permits for impounding structures to the Director of the Department of Conservation and Recreation or his designee.

Motion made by:

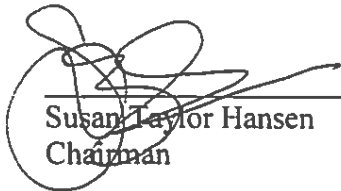
Jerry L. Ingle


Motion seconded by:

Stephen Lohr

Action:

adopted unanimously

  
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Susan Taylor Hansen  
Chairman

  
\_\_\_\_\_  
David A. Johnson  
Director

**VIRGINIA SOIL AND WATER CONSERVATION BOARD**

May 24, 2011 Meeting

In Senate Room A in the General Assembly Building

Richmond, Virginia

**Motion for the Board to authorize the Director of the Department of Conservation or his designee to issue certificates in accordance with § 10.1-605.1 of the Code of Virginia, effective July 1, 2011.**

In accordance with Chapter 323 of the 2011 Virginia Acts of Assembly (SB1456), §10.1-605.1 of the Dam Safety Act (Delegation of powers and duties) has been amended effective July 1, 2011, to authorize that "[t]he Board may delegate to the Director or his designee any of the powers and duties vested in the Board by this article, except the adoption and promulgation of regulations". This legislative action specifically removed the current prohibition to the Board delegating authority for "the issuance of certificates" to the Director or his designee.

Pursuant to this authority, the Virginia Soil and Water Conservation Board delegates the power and duty to issue Regular, Conditional, and Extensions of Operation and Maintenance Certificates for impounding structures to the Director of the Department of Conservation and Recreation or his designee, effective July 1, 2011.

Motion made by:


Gary Hornbaker


Motion seconded by:

Frank Blake, Jr.

Action:

unanimous approval

  
\_\_\_\_\_  
Susan Taylor Hansen  
Chairman

  
\_\_\_\_\_  
David A. Johnson  
Director

**Virginia Soil and Water Conservation Board**  
**September 7, 2016**  
**Virginia Department of Forestry**  
**Charlottesville, Virginia**

**MOTION to Reaffirm Dam Safety Program Delegations of Authority**

WHEREAS, at a meeting of the Virginia Soil and Water Conservation Board [Board] on December 11, 1991, the Board resolved to hereby delegate “to the Director of the Department of Conservation and Recreation, or his designee, the authority to act in place of the Board in all matters concerning inspections of dams and enforcement of the Dam Safety Law and Regulations, excepting only the issuance of permits and certificates, the promulgation of regulations and the conduct of hearings.”

WHEREAS, in 2006, § 10.1-605.1 of the *Code of Virginia* regarding Delegation of Powers and Duties was promulgated [Chapter 30 of the 2006 Virginia Acts of Assembly] to state that “[t]he Board may delegate to the Director or his designee any of the powers and duties vested in the Board by this article, except the adoption and promulgation of regulations or the issuance of certificates. Delegation shall not remove from the Board authority to enforce the provisions of this article.”

WHEREAS, at a meeting of the Board on November 18, 2010, in accordance with § 10.1-605.1, the Board further delegated “the power and duty to issue Construction Permits and Alteration Permits for impounding structures to the Director of the Department of Conservation and Recreation or his designee”.

WHEREAS, in 2011, § 10.1-605.1 of the *Code of Virginia* regarding Delegation of Powers and Duties was amended [Chapter 323 of the 2011 Virginia Acts of Assembly] to state “[t]he Board may delegate to the Director or his designee any of the powers and duties vested in the Board by this article, except the adoption and promulgation of regulations. Delegation shall not remove from the Board authority to enforce the provisions of this article. ...” This legislative action specifically removed the prohibition to the Board delegating authority for “the issuance of certificates” to the Director or his designee.

WHEREAS, at a meeting of the Board on May 24, 2011, in accordance with § 10.1-605.1, the Board further delegated “the power and duty to issue Regular, Conditional, and Extensions of Operation and Maintenance Certificates for impounding structures to the Director of the Department of Conservation and Recreation or his designee, effective July 1, 2011”.

WHEREAS, § 10.1-605 A of the *Code of Virginia*, states that “[t]he Board shall adopt regulations to ensure that impounding structures in the Commonwealth are properly and safely constructed, maintained and operated”.

IT IS THEREFORE RESOLVED and REAFFIRMED by the Board, that the Director of the Department of Conservation and Recreation or his designee, in accordance with § 10.1-605.1 of the *Code of Virginia*, shall have all of the powers and duties vested in the Board by the Dam Safety Act (§ 10.1-604 et seq. of the *Code of Virginia*), except the adoption and promulgation of regulations. Such powers and duties shall include the administration, implementation, and enforcement of the Impounding Structure Regulations to ensure that impounding structures in the Commonwealth are properly and safely constructed, maintained and operated. Delegation shall

not remove from the Board authority to enforce the provisions of the Act and the attendant regulations.

Motion made by: Jerry L. Ingle

Motion seconded by: Richard A. Street

Action: Unanimous



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Daphne W. Jamison  
Chair



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Clyde E. Cristman  
DCR Director



# Appendix B

## Guidance Applicable to the Notice of Deficiency Report



## **B: GUIDANCE APPLICABLE TO THE NOTICE OF DEFICIENCY REPORT**

It is DCR's mission to protect public safety by ensuring that regulated dams in the Commonwealth are operated and maintained in a safe condition in accordance with the law.<sup>32</sup> The Virginia Dam Safety Act outlines the administrative enforcement process that DCR will undertake if a dam is designated as unsafe.<sup>33</sup>

As an initial step in the enforcement process, DCR may use the dam's Annual Inspections Reports or other information in order to establish that the dam is operating in an unsafe condition.<sup>34</sup> Pursuant to the Act, a dam may be designated as unsafe if there are serious deficiencies in the dam's design, construction, or physical condition that if left unaddressed could result in loss of life or damage property or if the design, construction, operation, or maintenance of the dam is such that its expected performance during flooding conditions threatens its structural integrity.<sup>35</sup>

Under circumstances where an unsafe dam presents a non-imminent danger that if not corrected could threaten life or property the Virginia Soil and Water Conservation Board (Board) issues a Notice of Deficiency Report to the dam owner with findings and recommendations for correcting the deficiencies that are creating the unsafe condition.<sup>36</sup> The Notice of Deficiency Report also includes a schedule for correcting the deficiencies.

The Dam owner may submit his or her own plan and schedule to address the Report's recommendations and schedule. At this stage of the enforcement process, DCR staff will meet with the dam owner to discuss the corrective actions and negotiate the schedule. DCR works closely with Dam Owners who are facing costly corrective actions and who act in good faith to comply with the Report's recommendations and schedule. In an effort to work with the dam owner, DCR may revise the recommended corrective actions or schedule at the owner's request, if the plan and schedule are sufficient to address the deficiencies at the dam.<sup>37</sup> In addition, DCR may revise the schedule as needed depending on the facts and circumstances of the case.<sup>38</sup>

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<sup>32</sup> Va. Code § 10.1-604 et seq. and 4 VAC 50-20- et seq.

<sup>33</sup> Va. Code §§ 10.1-607, - 10.1-609, and 4 VAC 50-20-220.

<sup>34</sup> Va. Code § 10.1-607. It is important that the DCR staff gather sufficient evidence throughout the enforcement process sufficient to support the enforcement action.

<sup>35</sup> Va. Code § 10.1-607.1.

<sup>36</sup> Va. Code § 10.1-609.

<sup>37</sup> 4 VAC 50-20-220.C.

<sup>38</sup> DCR staff, including Regional Engineers and other technical staff, provides technical support as requested in order to resolve the case including inspection reports, inundation maps, and recommendations for corrective action items necessary to bring the dam into compliance with the law. The Enforcement Manager communicates with DCR staff as needed, keeping them informed of significant events in the case.

If the dam owner fails to comply with the recommendations in the Board’s Report, the Report will serve as the basis for the next step in the administrative enforcement process, which is a Special Order issued by the DCR Director. In addition to requiring that the dam owner correct the dam’s deficiencies, the Special Order may require, among other things, either that the water level in the impoundment be lowered or that the impoundment be drained of its contents until the unsafe condition is corrected. If necessary, the Director may cause the impoundment to be lowered or drained at the owner’s expense.<sup>39</sup>

The Notice of Deficiency Report is not a *case decision* as defined by the Virginia Administrative Process Act and, as such, is not subject to appeal in the courts and does not entitle the recipient to any additional due process prior to issuance.<sup>40</sup> The purpose of a Report is to notify the dam owner of the unsafe condition at the dam, the applicable law, and the potential consequences for failing to address the situation.

An example of a Notice of Deficiency Report with a Schedule of Compliance is attached to this Guidance.

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<sup>39</sup> Va. Code § 10.1-609.

<sup>40</sup> Virginia Code § 2.2 – 4001 defines “case” or “case decision” to mean “any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.”

*EXAMPLE*

**NOTICE OF DEFICIENCY REPORT**

May 26, 2016

Mr. and Mrs. Dam Owner  
534 Beautiful Lake Lane  
Lakeside, Virginia 22222

Re: Notice of Deficiency Report  
Beautiful Lake Dam  
Inventory # 121212

Dear Mr. and Mrs. Dam Owner:

Thank you for submitting the annual safety inspection report authorized by the Virginia Dam Safety Act, VA. CODE ANN. § 10.1-607 (2006), and the preliminary engineering report (PER) for the Beautiful Lake Dam (Dam) in Lakeside, Virginia. The results of the inspection report and PER indicate that the Dam is operating in an unsafe condition that, if not corrected, could threaten life or property.

The purpose of this Deficiency Report is to notify you pursuant to the Dam Safety Act, VA. CODE ANN. § 10.1-609, of apparent deficiencies with respect to the Dam's unsafe condition and the Virginia Soil and Water Board's recommendations for correcting the deficiencies. The Board's recommendations are included in the schedule of compliance attached to this Deficiency Report.

As we discussed during our meeting of May 16, 2016, pursuant to the Dam Safety Act, VA. CODE ANN. § 10.1-609, as owner of the Dam, you are required to implement the recommendations in the Report in accordance with the schedule of compliance in order to correct the deficiencies that are creating the Dam's unsafe condition. Under the law, failure on your part to implement the recommendations may result in the issuance of a Special Order by the Director of Department of Conservation and Recreation (DCR) directing implementation of the schedule of compliance. A Special Order issued in accordance with the Act, VA. CODE ANN. § 10.609, may authorize the lowering or complete draining of the impoundment at your expense until the Dam's unsafe condition is corrected.

The Notice of Deficiency Report is not a case decision as defined by the Virginia Administrative Process Act. The purpose of a Report is to notify the dam owner of the unsafe condition at the dam, the applicable law, and the potential consequences for failing to address the situation.



Please call Anne Crosier, the DCR Enforcement Manager, at (804) 225-2549, if you have any questions regarding this Deficiency Report.

Sincerely,

David C. Dowling  
Deputy Director  
of Soil and Water Conservation and  
Dam Safety and Floodplain  
Management

cc:

**VIRGINIA DEPARTMENT OF CONSERVATION AND  
RECREATION  
DEFICIENCY REPORT  
SCHEDULE OF COMPLIANCE  
BEAUTIFUL LAKE DAM**

1. On or before July 25, 2016, submit to the Virginia Department of Conservation and Recreation (DCR) a plan and construction schedule for correcting deficiencies at the Dam so that any unsafe conditions are removed and the Dam is brought into compliance with the Virginia Dam Safety Act and Regulations.
2. On or before July 25, 2016, install traffic barriers and signage indicating the driveway is unsafe
3. On or before July 25, 2016, lower the water level in the Lake so that the discharge of the Lake does not occur via the existing deteriorating drain pipe.
4. On or before July 25, 2016, provide documentation to DCR demonstrating that the water level in the Lake has been lowered.
5. It is understood between the parties that inclement weather and other acts of God beyond the Dam owner's control may require that completion dates be extended. The Dam owner shall notify DCR within 48 hours if the need for an extension arises. In addition, DCR will extend completion dates, as appropriate, during DCR's permit application review and issuance process.



# Appendix C

## Guidance Applicable to Special Orders



## C: Guidance Applicable to Special Orders

The Notice of Deficiency Report serves as the basis for the final step in the administrative enforcement process, which is a Special Order issued by the DCR Director. Pursuant to Virginia Dam Safety Act, if a dam owner fails or refuses to commence or diligently implement the recommendations for correcting deficiencies to remove the unsafe condition at the dam according to the schedule of compliance appended to the Report, the Director has the authority to issue a Special Order directing the owner to implement the recommendations according to the schedule.<sup>41</sup>

DCR works closely with Dam Owners who are facing costly corrective actions and who act in good faith to comply with the Special Order's recommendations and schedule. In an effort to work with the Dam Owner, DCR may revise the schedule of compliance at the dam owner's request as needed depending on the facts and circumstances of the case.<sup>42</sup>

Within thirty days after being served either by personal service or mail with a copy of a Special Order, any dam owner shall have the right to petition the Board for a hearing. As part of the petition, a dam owner may submit to the Board a plan and schedule, consistent with the Virginia Impounding Structure Regulations,<sup>43</sup> to address the Report's recommendations for correcting deficiencies. The Board shall determine if the submitted plan and schedule are sufficient to address deficiencies. A timely filed petition shall stay the effect of the administrative order.<sup>44</sup>

The informal fact-finding hearing shall be conducted before the Board or a designated member thereof pursuant to § 2.2-4019. The Board shall have the authority to affirm, modify, amend or cancel the Special Order. Any owner aggrieved by a decision of the Board after a hearing shall have the right to judicial review of the final Board decision pursuant to the provisions of the Administrative Process Act.<sup>45</sup>

Dam owners may appeal final Board decisions in any court of competent jurisdiction. The judgments of the courts of original jurisdiction are subject to

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<sup>41</sup> Va. Code § 10.1-609.A. The schedule may be revised as appropriate.

<sup>42</sup> DCR staff, including Regional Engineers and other technical staff, provides technical support as requested in order to resolve the case including inspection reports, inundation maps, and recommendations for corrective action items necessary to bring the dam into compliance with the law. The Enforcement Manager communicates with DCR staff as needed, keeping them informed of significant events in the case.

<sup>43</sup> 4 VAC 50-20-10 et seq. and Va. Code § 10.1-605.

<sup>44</sup> Va. Code § 10.1-609.A.

<sup>45</sup> Va. Code § 2.2-4000 et seq. and 10.1-609.A.

appeal by higher courts,<sup>46</sup> and dam owners must provide notice to DCR of the appeal within 30 days of the final decision's date of service, which is either the date the dam owner receives the final decision or the date it was mailed, whichever occurs first.

The Director, upon a determination that there is an unsafe condition at an impounding structure, is authorized to cause the lowering or complete draining of such impoundment until the unsafe condition has been corrected at the owner's expense and prior to any authorization to refill. An owner who fails to comply with the provisions contained in an administrative order of the Department shall be subject to procedures set out in § 10.1-613 and penalties authorized under § 10.1-613.1 and 10.1-613.1.<sup>47</sup>

If the Director determines that changed circumstances justify reclassifying the deficiencies of an impounding structure as an imminent danger to life or property after the Board issues the Notice of Deficiency Report, the Director may proceed directly under § 10.1-613 to enforce the Special Order by instituting a proceeding to compel compliance in a court of competent jurisdiction. The dam owner shall have the opportunity to contest the facts that served as the basis for the issuance of the Special Order.<sup>48</sup>

An example of a Special Order is attached to this Guidance.

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<sup>46</sup> Va. Code § 2.2-4026.A. In addition, when any case decision is the subject of an enforcement action in court, it is reviewable by the court as a defense to the action and the judgment shall be appealable as in other cases.

<sup>47</sup> Va. Code 10.1-609.C.

<sup>48</sup> Va. Code 10.1-609.B.

## EXAMPLE

### SPECIAL ORDER

#### ISSUED TO

*[DAM OWNER/NAME OF DAM]*  
(*Inventory No.*)

#### **SECTION A: Purpose**

This is a Special Order issued under the authority of Va. Code §§ 10.1-609, -613, and -613.1 by the Director of the Virginia Department of Conservation and Recreation to *[Dam Owner]* regarding the *[Name of Dam]* for violations of the Virginia Dam Safety Act and the Virginia Impounding Structure Regulations.

#### **SECTION B: Definitions:**

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. “Va. Code” means the Code of Virginia (1950), as amended.
2. “Board” means the Soil and Water Conservation Board, a permanent citizens’ board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-104.1, -503, and -603.2:1.
3. “Department” or “DCR” means the Department of Conservation and Recreation, an agency of the Commonwealth of Virginia as described in Va. Code §§ 10.1-101 and -104.1.
4. “Director” means the Director of the Department of Conservation and Recreation.
5. “Order” means this document, also known as a Special Order.
6. “Regulations” mean the Virginia Impounding Structure Regulations codified at § 4 VAC 50-20-10, et seq.

*[This section includes other definitions as appropriate.]*

#### **SECTION C: Findings of Fact and Conclusions of Law**

1. *[This section includes an account of the facts and citations to applicable law.]*

## **SECTION D: Agreement and Order**

Accordingly the Director, by virtue of the authority granted in Va. Code §10.1-609, orders *[Dam Owner]* to perform the actions described in Appendix 1 of this Order.

## **SECTION E: Administrative Provisions**

1. The Board or Director may modify, rewrite, or amend the Order on its own motion after providing *[Dam Owner]* notice and opportunity to be heard. Pursuant to Va. Code § 10.1-613.3, the *[Dam Owner]* may not bring an action against the Commonwealth, the Board, the Department, or agents or employees of the Commonwealth for the recovery of damages caused by the partial or total failure of the *[Dam]* or reservoir, or by the operation of the *[Dam]* or reservoir, or by an act or omission in connection with issuance of enforcement orders related to the operation or maintenance of the *[Dam]* or reservoir.
2. Pursuant to Va. Code § 10.1-613.4, nothing in this Order shall relieve the *[Dam Owner]* from any legal duties, obligations, and liabilities resulting from ownership and operation of the *[Dam]*. The owner shall be liable for damage to the property of others or injury to persons, including, but not limited to, loss of life resulting from the operation or failure of the *[Dam]*. Compliance with the Virginia Dam Safety Act, Va. Code § 10.1-604, et seq. does not guarantee the safety of the *[Dam]* or relieve the *[Dam Owner]* in case of a *[Dam]* failure.
3. This Order addresses and resolves those violations specifically addressed herein. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the *[Dam's]* unsafe condition as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.

Pursuant to Va. Code § 10.1-609.A, the *[Dam Owner]* may petition the Board for a hearing within 30 days of being served by mail with a copy of the Order.

4. Failure by *[Dam Owner]* to comply with any of the terms of this Order shall constitute a violation of an Order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of

such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

5. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
6. **[Dam Owner]** shall be responsible for its failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence or circumstances beyond the **[Dam Owner's]** control. **[Dam Owner]** shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. **[Dam Owner]** shall notify the Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order.

Such notice shall set forth:

- a. the reasons for the delay or noncompliance;
- b. the projected duration of any such delay or noncompliance;
- c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
- d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Director within a reasonable time of learning of any condition above, which **[Dam Owner]** intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

7. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.
8. This Order shall become effective upon execution by the Board.
9. This Order shall continue in effect until the Director or the Board terminates the Order in his or its sole discretion upon 30 days written notice to **[Dam Owner]**. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve **[Dam Owner]** from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.



And it is so ORDERED this *[date]* day of *[month]*,  
20*[year]*.

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Director, Department of  
Conservation and Recreation

**APPENDIX 1**  
**SCHEDULE OF COMPLIANCE**

**[Includes corrective measures, as well as deadlines for completing the measures for example:**

The Dam Owner shall:

1. Upon receipt of this Special Order by certified mail, immediately begin to drain the Lake to a maximum depth of eight feet and maintain the Lake in this drained condition until written authorization is obtained from the Director of DCR to refill the Lake to normal pool level. The draining rate shall be at approximately six inches vertical drop per day and shall be conducted under the supervision and direction of the Dam Owner's professional engineer. Failure on the part of the Dam Owner to comply with this requirement shall result in the Director causing the Lake to be drained pursuant to these instructions and at the Dam Owner's expense.
2. On or before September 25, 2016, submit to the Virginia Department of Conservation and Recreation (DCR) a plan and construction schedule for correcting deficiencies at the Dam so that any unsafe conditions are removed and the Dam is brought into compliance with the Virginia Dam Safety Act and Regulations.
3. On or before September 25, 2016, install traffic barriers and signage indicating the driveway is unsafe.
4. On or before September 25, 2016, lower the water level in the Lake so that the discharge of the Lake does not occur via the existing deteriorating drain pipe.
5. On or before September 25, 2016, provide documentation to DCR demonstrating that the water level in the Lake has been lowered.
6. The Dam Owner shall be responsible at all times for ensuring that no nuisance is created at the Dam and Lake.
7. It is understood between the parties that acts of God such as inclement weather and other circumstances beyond the Dam owner's control may require that completion dates be extended. The Dam owner shall notify DCR within as reasonable time if the need for an extension arises. In addition, DCR will extend completion dates, as appropriate, during DCR's permit application review and issuance process.]

# Appendix D

## Guidance for Assessing Civil Charges



## D: GUIDANCE FOR ASSESSING CIVIL PENALTIES

The Virginia Dam Safety Act provides that the Virginia Soil and Water Conservation Board may assess a dam owner that violates any provision of the Virginia Dam Safety Act a civil penalty of up to \$500 per day not to exceed a maximum of \$25,000.<sup>49</sup>

Whether a civil penalty is warranted will depend upon the facts of the case. The purpose of assessing a civil penalty is to act as a deterrent to future noncompliance among the regulated community of dam owners. In order to be effective, the method employed to assess a civil charge should be fair, reasonable, and easily understood. Moreover, the method used should be applied consistently to ensure that dam owners are treated equitably throughout the Commonwealth.

In setting the civil penalty amount, the Virginia Dam Safety Act requires that the Board consider (i) the nature, duration, and number of previous instances of failure by the owner to comply with requirements of law relating to dam safety and the requirements of Board regulations and orders; (ii) the efforts of the owner to correct deficiencies or other instances of failure to comply with the requirements of law relating to dam safety and the requirements of Board regulations and orders that are the subject of the proposed penalty; (iii) the cost of carrying out actions required to meet the requirements of law and Board regulations and orders; (iv) the hazard classification of the dam; and (v) other factors deemed appropriate by the Board.<sup>50</sup>

The Virginia Dam Safety Act requires that the Board assess all civil penalties by written penalty notice delivered to the dam owner by certified mail or personal service. The notice states the specific reasons for the penalty, the number of days the Department considers the owner in violation, and the total amount due. Within 30 days after receipt of a copy of the written penalty notice, any owner subject to the civil penalty provisions shall have the right to petition the Board, in writing, for a hearing. A timely filed petition shall stay the effect of the penalty notice.<sup>51</sup>

The hearing shall be conducted before the Board or a designated member thereof as an Informal Fact-finding proceeding pursuant to the Virginia Administrative Process Act, §2.2-4019. The Board shall affirm, modify, amend, or cancel the penalty notice within 10 days following the conclusion of the hearing. Any owner aggrieved by a decision of the Board after a hearing shall have the right to judicial review of the final Board decision.<sup>52</sup>

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<sup>49</sup> Va. Code § 10.1-613.2

<sup>50</sup> Va. Code § 10.1-613.2

<sup>51</sup> Va. Code § 10.1-613.2.

<sup>52</sup> Va. Code § 2.2-400 et seq.

Dam owners may appeal final Board decisions in any court of competent jurisdiction. The judgments of the courts of original jurisdiction are subject to appeal by higher courts.<sup>53</sup> Dam owners must provide notice to DCR of the appeal within 30 days of the final decision's date of service, which is either the date the dam owner receives the final decision or the date it was mailed, whichever occurs first.<sup>54</sup>

If any civil penalty has not been paid within 45 days after the final Board decision or court order has been served on the violator, the Board shall request the Attorney General to institute a civil action in the court of any county in which the violator resides or has his principal place of business to recover the amount of the assessment.<sup>55</sup>

Civil penalties assessed by the Board or the court are paid into the Flood Prevention and Protection Assistance Fund and shall be used for the administration of the Dam Safety Program, including for the repair and maintenance of dams.<sup>56</sup>

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<sup>53</sup> Va. Code § 2.2-4026.A.

<sup>54</sup> Va. Code § 2.2-4026.A.

<sup>55</sup> Va. Code §10.1-613.2.

<sup>56</sup> Va. Code §10.1-613.2 and §10.1-603.17.

# Appendix E

## Guidance Applicable to Informal Fact-Finding Proceedings



## **E: GUIDANCE APPLICABLE TO INFORMAL FACT-FINDING PROCEEDINGS**

When acting in an adjudicatory or decision-making role with respect to enforcement actions, the Board is subject to the procedures outlined in the Virginia Administrative Process Act.<sup>57</sup> Accordingly, the Board conducts informal fact-finding proceedings in order to hear all of the facts and circumstances surrounding a case before making any “case decision.”<sup>58</sup> As part of its decision-making process, the Board may rely upon public data, documents, and other information and will notify all parties prior to the proceeding of any information upon which the Board intends to rely in arriving at a decision.<sup>59</sup>

The Board may hold the proceeding on its own initiative or at the request of a party seeking the case decision (*i.e.*, the dam owner).<sup>60</sup> A dam owner may petition the Board for a hearing under the following circumstances: (i) where the Board issues a Special Order to a dam owner directing the owner to correct deficiencies to remove an unsafe condition or to comply with plans; (ii) where the Board issues a Special Order to a dam owner directing the owner to comply with approved plans and specifications for the construction, maintenance or alteration of a dam; (iii) where the Board issues the dam owner a temporary stop work order on a construction or alteration project if the project lacks the required approvals or the work does not comply with approved plans and specifications; and (iv) where the Board has assessed the dam owner a civil penalty by written penalty notice.<sup>61</sup>

The Board may conduct the above-described hearings as informal-fact finding proceedings pursuant to Va. Code § 2.2 –4019 and may render a final case decision regarding the subject of the hearing. Any owner aggrieved by a decision of the Board after such hearings shall have the right to judicial review of the final case decision.<sup>62</sup>

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<sup>57</sup> Va. Code § 2.2-4000, *et seq.* DCR is subject to the same procedures.

<sup>58</sup> The Virginia Administrative Process Act, Va. Code § 2.2-4001, defines “case decision” as “any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.”

As a practical matter, DCR is most likely to use the informal fact-finding proceeding to resolve outstanding issues, but the Board may also hold such proceedings in order to render case decisions, as it deems necessary.

<sup>59</sup> Va. Code § 2.2-4019.B.

<sup>60</sup> The regulated party and the agency may agree to waive the informal fact-finding proceeding and go directly to a formal hearing.

<sup>61</sup> Va. Code §10–609.A. ; -610.1.B; -612.1; and -613.2.

<sup>62</sup> Va. Code §10–609.A. ; -610.1.B; -612.1; and -613.2.

The regulated party is entitled to the following rights under the Virginia Administrative Process Act: (i) to reasonable notice of the proceedings; (ii) to appear, in person or by counsel or other qualified representative for the informal presentation of factual data, argument or proof in connection with any case; (iii) to notice of any contrary fact basis or information in the possession of the Board that can be relied upon in making an adverse decision; (iv) to a prompt decision by the Board; and (v) to be informed, briefly and in writing, of the factual or procedural basis for an adverse decision.<sup>63</sup>

The Board may appoint a staff member or other person acting on the Board's behalf to preside over the informal-fact-finding proceeding,<sup>64</sup> but no one who is or has been substantively involved with the case may preside. The "Presiding Officer" is responsible for resolving any issues that arise prior to the proceeding (*e.g.*, date changes, submissions, *etc.*), conducting the proceeding, and recommending a decision to the Board.<sup>65</sup> The individual appointed to serve as Presiding Officer should have some knowledge of the applicable laws and regulations. Pursuant to Va. Code § 2.2-4022, the Presiding Officer, through the Board, may issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence.<sup>66</sup>

It is the Board's responsibility to decide the case based on the record, submissions, and recommendations generated from the fact-finding proceeding.<sup>67</sup> The case decision that results from an informal fact-finding proceeding is a determination whether or not the regulated party is in compliance with a law, regulation, or permit requirement within the Board's jurisdiction to enforce. As such, the decision includes no monetary sanction nor directs any action on the part of the regulated party.

The Virginia Administrative Process Act requires that the decision-maker render the case decision within 90 days of the proceeding, although the parties may agree to a later date.<sup>68</sup> Agreements to extend the deadline for the decision 90 days should be in

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<sup>63</sup> Va. Code § 2.2-4019.A.

<sup>64</sup> Va. Code §2.2-4001. The regulated party and DCR may agree at the outset that DCR employ a hearing officer to preside over the informal fact-finding proceeding. Such agreement may be revoked only by mutual consent. Pursuant to Va. Code § 2.2-4024, the Executive Secretary of the Supreme Court prepares and maintains a list of attorneys qualified to preside over informal and formal administrative proceedings. Upon the Director's request, the Executive Secretary selects a hearing officer from the list to preside over the informal fact-finding proceeding.

<sup>65</sup> If a hearing officer acts as Presiding Officer, the appointment letter for the hearing officer should state whether, in addition to conducting the proceeding, he or she is empowered to make a recommendation to the Director.

<sup>66</sup> The Director must sign subpoenas.

<sup>67</sup> The Director may delegate the decision-making responsibility to another (*e.g.*, the Presiding Officer), but such delegation should be in writing.

<sup>68</sup> If a hearing officer serves as Presiding Officer and is empowered to make a recommendation, he or she must provide the recommendation with 90 days of the proceeding. The Director has an additional 30



writing. The regulated party has the right to appeal an adverse case decision to the appropriate court.<sup>69</sup>

## **I. Preparing for the Proceeding**

### **A. Scheduling, Notice, Location**

1. DCR staff contacts the regulated party in order to reach agreement on the date, time, and place of the proceeding.<sup>70</sup>
2. DCR staff notifies the regulated party by letter (Notice Letter) of DCR's intention to conduct the informal fact-finding proceeding. The Notice Letter includes the following information: (i) the date, time, and place for the proceeding; (ii) a list of the regulated party's rights pursuant to the Virginia Administrative Process Act;<sup>71</sup> (iii) an explanation of the purpose of the proceeding including the applicable facts and law with respect to each allegation; (iv) a citation to DCR's legal authority for rendering a case decision on the alleged violations; and (v) a description of any public data, document or information upon which DCR intends to rely at the proceeding.<sup>72</sup>
3. DCR staff ensures delivery of the Notice Letter to the Regulated Party 30 days prior to the scheduled date for the proceeding by one of the following three methods: (i) certified mail, return receipt requested; (ii) service of process; or (iii) by hand.
4. DCR staff prepares and submits DCR's proposed findings of fact and conclusions of law to the Presiding Officer.

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days from the receipt of the recommendation to render a decision; otherwise, the Director has 90 days to decide.

<sup>69</sup> The Virginia Supreme Court rules govern the appeal. See Va. Code § 2.2 – 4026 and Virginia Supreme Court Rule 2A:2.

<sup>70</sup> Absent an agreement with the regulated party, the proceeding will be conducted in the county or city where the regulated party either (i) resides; (ii) regularly or systematically conducts affairs or business activity; (iii) has any property affected by the administrative action; or (iv) if the preceding do not apply, in the county or city where the violations are alleged to have occurred. Va. Code §§ 2.2-4003 and 8.01-261.

<sup>71</sup> Virginia Code § 2.2-4019.

<sup>72</sup> Virginia Code § 2.2-4019.B.

5. DCR staff arranges for a room in which to conduct the proceeding and for any equipment needed for the presentation.
6. DCR staff arranges to record the proceeding either by making an audiotape recording or by court reporter.

**B. Presiding Officer -Appointment and Pre-proceeding Responsibilities**

1. DCR staff arranges through consultation with the Director's Office for the appointment of a Presiding Officer.
2. The Presiding Officer is responsible for coordinating dates changes and requesting any pre-proceeding submissions. *Note: The informal fact-finding process does not allow for discovery.*

**II. The Proceeding**

**A. Participants, Submissions**

1. Participants in the meeting include the Presiding Officer, the DCR staff person making the presentation for DCR, the regulated party and his or her counsel, and any witnesses.
2. The Presiding Officer directs the course of the proceeding and ensures that the record is sufficiently developed to support the case decision.
3. Participants may submit proposed findings of fact and conclusions of law at the outset of the proceeding.

**B. Order of Proceeding**

1. The Presiding Officer opens the proceeding and explains to the participants that each party will present his or her case in turn and that each may make an opening statement and call witnesses but that cross examination of witnesses is not allowed.

2. The Presiding Officer directs each party as to when to present his or her case and maintains order throughout the proceeding.
3. DCR, followed by the regulated party, gives a brief statement of the case and calls witnesses to give direct testimony. After witnesses from both sides have testified, DCR makes a brief closing argument, directly followed by the regulated party with his or her closing argument.
4. Throughout the proceeding, the Presiding Officer asks questions of witnesses to ensure that the record is fully developed and requests additional findings of fact and conclusions of law, if necessary.
5. After each side has finished making a closing argument, the Presiding Officer explains how the decision process works and requests any post-proceeding submissions.
6. The Presiding Officer adjourns the proceeding.

### **III. Post-Proceeding Matters**

#### **A. Recommendation Package**

1. The Presiding Officer must deliver the recommendation package to the Board and the parties within **45 days** of the informal fact-finding proceeding, unless the parties agree in writing to a later date. ***Note: If a hearing officer presides, he or she must submit the recommendation package within 90 days of the date of the proceeding.***
2. The recommendation for the case decision should include a brief summary of the issues and findings of fact and conclusions of law. The Presiding Officer may adopt either party's findings of fact and conclusions of law, in whole or in part, but is not obliged to do so. The recommendation package should also include (i) a list of all those who appeared at the proceeding, (ii) the name and address of all those on whom the final case decision should be served, and (iii) the complete record of the proceeding.

#### **B. Record**

1. The Presiding Officer is responsible for assembling the record.
2. Typically, the record comprises (i) the recommended case decision (*i.e.*, a brief summary of the issues and proposed findings of fact and conclusions of law); and (ii) an audiotape or transcript of the proceeding; and (iii) any submissions collected by the Presiding Officer.

#### **IV. The Case Decision**

##### **A. Deadlines for Final Decision**

1. The Board has **90 days** from the date of the proceeding to render a final decision, unless the parties agree to a later date.
2. If a hearing officer presided, the Board has **30 days** from the date of receiving the recommendation package, unless the parties agree in writing to a later date. ***The hearing officer must submit the recommendation package with 90 days of the proceeding.***

##### **B. Contents of Final Decision**

1. The Board may afford the parties an opportunity to submit comments on or exceptions to the Presiding Officer's recommendation. **This does not extend the deadline for rendering the final decision, unless all the parties agree to a later date.**
2. Typically, the case decision is rendered in the form of findings of fact and conclusions of law. The Board may adopt the Presiding Officer's recommendation in whole or in part or the findings of fact and conclusions of law submitted by one of the parties to the hearing, in whole or in part.

##### **C. Notice to the Regulated Party**

1. The Board must notify the regulated party in writing of the case decision. The Notice should be delivered by certified mail, return receipt requested, within five days of the decision and should include a copy of the final case

decision (i.e., a brief summary of issues and the findings of fact and conclusions of law).

2. The Notice of Decision Letter must inform the regulated party of his or her right to appeal. The following language may be included in the Notice of Decision Letter:

If you intend to appeal this decision to a Virginia court, you must provide notice to the Virginia Department of Conservation and Recreation, Office of the Director, 600 East Main Street, 24<sup>th</sup> Floor, Richmond, Virginia 23219. As provided by Rule 2A:2 of the Rules of the Supreme Court of Virginia, you have 30 days from the date of service of this decision (either the date you actually received this decision or the date on which it was mailed to you, whichever occurred first) within which to file a Notice of Appeal. That period of time increases by three days if you receive the decision by mail.

Please refer to Part Two A of the Rules of the Supreme Court of Virginia for a description of the required contents of the Notice of Appeal and additional requirements governing appeals from the decisions of administrative agencies.

There is a further requirement in 2A:3 that the party includes a transcript of the testimony along with notice.

# Appendix F

## Guidance Applicable to Formal hearings



## F: GUIDANCE APPLICABLE TO FORMAL HEARINGS

The Virginia Dam Safety Act provides that the Virginia Soil and Water Conservation Board (Board) may hold a formal hearing, including the formal taking of evidence upon relevant fact issues, in any case to the extent that informal procedures under §2.2-4019 have not been had or have failed to dispose of the case by consent.<sup>73</sup>

A party to a formal hearing is entitled to reasonable notice of (i) the hearing's time and place; (ii) the basic law under which DCR contemplates taking action; and (iii) matters of law and fact asserted or questioned by DCR. In addition, a party to a formal hearing is entitled (i) to be represented by counsel; (ii) to submit and rebut evidence; (iii) to cross examine witnesses; and (iv) to have a prompt decision regarding his or her case.

The full Board or, at a minimum, a quorum of the Board may preside over a formal hearing.<sup>74</sup> Unless the Board chooses to preside at the request of the Director or on its own initiative, a hearing officer selected from a list of attorneys maintained by the Executive secretary of the Virginia Supreme Court must preside over a formal hearing.<sup>75</sup>

Either the Board or the hearing officer employed by the Board, depending on who presides, ("Presiding Officer") is charged with the following responsibilities with respect to a formal hearing:

- to establish the date, time, and place of the hearing;
- to provide notice of the hearing to all parties;
- to manage the pre-hearing exchange of information so that all parties have access to the information that may be entered into evidence and to the witnesses that may be called;
- to explain the hearing process to all parties either at a pre-hearing conference or prior to the hearing;
- to manage the transcript and record of the case; and
- on the part of a hearing officer, to make a timely recommendation to the decision-maker; or
- on the part of the Board or DCR, to make a timely decision.

At formal hearings, an Assistant Attorney General presents the case for DCR, unless the Attorney General authorizes a DCR staff person to serve in that role. The

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<sup>73</sup> Va. Code § 2.2-4020.A.

<sup>74</sup> Va. Code § 2.2-4024.F. If a Board member designated by the Chair presides over the formal hearing that Board member may not participate in making the final decision resulting from the hearing.

<sup>75</sup> Va. Code § 2.2-4024.A.

regulated party may be represented by counsel. In general, a formal hearing would proceed with the Presiding Officer's introductory remarks and disposition of preliminary motions; opening statements from DCR and the regulated party; testimony of witnesses, presentation of evidence, and cross examination by both parties; closing arguments; submission of proposed findings of fact and conclusions of law, if not previously submitted; and adjournment.

The Administrative Process Act requires that a verbatim record of the hearing be taken and filed with the Board.<sup>76</sup> It is the Presiding Officer's responsibility to manage the record. DCR, on its own initiative, or at the request of the Board or the Presiding Officer may employ a court reporter in order to ensure that the required verbatim record is clear and accurate.

The decision-maker, which may be either the Board or the Director depending on the circumstances, must render the case decision within 90 days of the proceeding, although the parties may agree to a later date. If a hearing officer serves as Presiding Officer and is empowered to make a recommendation to the Board or Director, he or she must provide the recommendation with 90 days of the proceeding. The Board or the Director has an additional 30 days from the receipt of the recommendation to render a decision; otherwise, the Board or the Director has 90 days to decide.<sup>77</sup> The regulated party has the right to appeal an adverse case decision to the appropriate court.<sup>78</sup>

Additional guidance in the form of specific procedures for conducting formal hearings is outlined below. The procedures are based on the "Hearing Officer Deskbook, A reference for Virginia Hearing Officers," published by the Office of the Executive Secretary of the Virginia Supreme Court of Virginia (revised December 2013). The procedures are intended for use by the Virginia Soil and Water Conservation Board or a hearing officer selected from a list of attorneys maintained by the Executive Secretary of the Virginia Supreme Court Supreme who is conducting a hearing for the Board.

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<sup>76</sup> Va. Code § 2.2-4020 and § 10.1-603.12:7.

<sup>77</sup> Va. Code § 2.2-4021.

<sup>78</sup> The Virginia Supreme Court rules govern the appeal. See Va. Code § 2.2 - 4026.



## Specific Procedures Applicable to Formal hearing

### I. PRE-HEARING ISSUES

#### A. Scheduling, Notice, and Location

1. The Presiding Officer is responsible for scheduling the hearing. Hearings should be scheduled at a time convenient to all parties, when possible.<sup>79</sup>
2. The Presiding Officer should determine the place at which the hearing will be held. All parties must agree to the location; otherwise, the hearing must be conducted in the county or city where the regulated party either (i) resides; (ii) regularly does business; (iii) has property affected by the action; or (iv) if the preceding do not apply, in the County or City where the violations are alleged to have occurred.
3. The Presiding Officer is responsible for providing formal notice of the hearing (Notice Letter) to the parties prior to the hearing.
  - a. The Notice Letter must be delivered by certified mail, return receipt requested, at least 30 days prior to the hearing.
  - b. The Notice Letter must state the date, time and place of the hearing; the basic law under which the Board or DCR contemplates taking action; the nature of the hearing (*e.g.*, to revoke a permit), alleged violations and citations to pertinent law and regulations; and the remedy sought (*e.g.*, issuance of Special Order).
  - c. The Notice should recite the rights to which a party to the hearing is entitled including (i) to be represented by counsel; (ii) to submit oral and documentary evidence and rebuttal proofs; (iii) to conduct cross examine witnesses as may elicit a fair and full disclosure of the facts; (iv) to submit in writing for the record proposed findings of fact and conclusions of law; and (v) to have a prompt decision regarding his or her case.

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<sup>79</sup> The Presiding Officer may be a one of the following, depending on the circumstances: (i) a hearing officer employed by DCR or the Board; (ii) the full Board (iii) a quorum of the Board; or at least one member of the Board designated by the Board Chair to conduct hearings.

4. If the parties agree, the hearing may be held sooner than indicated in the Notice Letter. The Presiding Officer may grant a change in the time, place, or date in order to prevent a substantial delay, expense, or detriment to the public interest, or to avoid undue prejudice to a party.

## **B. Exchange of Information**

1. The Virginia Administrative Process Act does not permit discovery; however, the Presiding Officer may require all parties to exchange the information upon which each intends to rely in making a case, in advance of the hearing. Information to be exchanged should include a list of witnesses each party intends to call and any documents that may be entered into evidence.
2. The Presiding Officer may set a deadline for the exchange of information and limit the testimony of witnesses and the entry of evidence to that provided in the pre-hearing exchange of information.

## **C. Pre-hearing Statements and Conferences**

1. The Presiding Officer, on his or her own initiative or upon the request of any of the parties, may schedule a pre-hearing conference, with due regard for the convenience of all parties, allowing reasonable notice of the conference's time, place, and purpose. The conference may be held in person or by telephone, depending on the circumstances.
2. The purposes of a pre-hearing conference are to (i) identify, simplify, and clarify the issues; (ii) afford the Presiding Officer the opportunity to explain hearing procedures and the roles of the parties; and (iii) afford the parties an opportunity to discuss stipulations and admissions of fact and the content and authenticity of documents; disclosure of the number and identities of witnesses; and the possibility of settlement.<sup>80</sup>
3. The Presiding Officer may require the parties to submit proposed Findings of Fact and Conclusions of Law in advance of the hearing. Typically, facts are organized chronologically, issue by issue, and supported by evidence in the record. The legal conclusions are organized in the same manner as the facts and are supported by citations to the law or regulations, or both.

## **D. Subpoenas and Depositions**

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<sup>80</sup> The Presiding Officer may not participate in settlement discussions but may issue a stay upon the request of the parties, if they wish to pursue a settlement.

1. The Presiding Officer may issue subpoenas and subpoenas duces tecum under the signature of the Board or the Director of DCR. The Presiding Officer must issue subpoenas upon request of a party.<sup>81</sup> A subpoena is a command to appear at a certain time and place to give testimony upon a certain matter. A subpoena duces tecum requires production of books, papers, and other things.
2. Depositions may be taken and read as in actions at law.<sup>82</sup>

## **E. *Ex Parte* Communications**

1. The Presiding Officer should avoid any *ex parte* communication (*i.e.*, any exclusive communication) with any party, counsel, or other interested party in an effort to ensure a fair hearing.
2. The Presiding Officer should make note of any *ex parte* communication that may occur for the record and bring it to the attention of all the parties for comment on the record.

## **II. The Hearing**

### **A. Failure to Attend**

1. A party who fails to attend a pre-hearing conference should be notified of any rulings and given an opportunity to object, whether or not the party had reasonable notice of the conference.
2. Under circumstances where a party fails to attend the formal hearing without good cause and after having been given reasonable notice pursuant to the Virginia Administrative Process Act, the Presiding Officer may proceed with the hearing and recommendation.

### **B. Written Statements**

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<sup>81</sup> Va. Code § 10.1-603.12:7.D and § 2.2-4022.

<sup>82</sup> Va. Code § 10.1-603.12:7.B and § 2.2-4022.

1. The Presiding Officer may admit written statements from witnesses into the record and should allow parties to exchange all written statements during the exchange of information prior to the hearing.
2. Parties may subpoena a witness who provides a written statement in order to cross examine that witness at the hearing. In addition, advance notice of a written statement during the pre-hearing exchange of information allows a party to formally object to its introduction into evidence.

**C. Evidence**

1. The Presiding Officer is authorized to receive probative evidence and to rule upon offers of proof. Any evidence may be admitted, if it appears relevant, reliable, and not otherwise improper. The probative weight of hearsay evidence, usually inadmissible under the rules of evidence, is left to the Presiding Officer's discretion.
2. The Presiding Officer is authorized to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal or cross examination. The evidence in the record should be sufficient to justify the Presiding Officer's recommendation and any resulting decision made by the Board or DCR.

**D. Experts**

1. The Presiding Officer may admit expert testimony into the record. It is within the Presiding Officer's discretion to qualify an expert and to determine the weight afforded the expert opinion. The Presiding Officer is not bound by any expert's opinion and, at times, must resolve conflicts between the testimonies of experts.
2. Parties should exchange the names, addresses, and qualifications of any expert that may testify during the pre-hearing exchange of information.

**E. Burden and Standard of Proof**

1. The burden of proof is on the “proponent or applicant.”<sup>83</sup> When pursuing enforcement actions, DCR is the proponent and must provide sufficient evidence to justify the action it seeks, whether the action is to issue an order or to revoke a permit.
2. The standard of proof is similar to “preponderance of the evidence.” In other words, DCR’s case that the action sought is justified must be stronger than the regulated party’s case that the action is unjustified.

#### **F. The General Order of the Proceeding**

1. The Presiding Officer opens the proceeding with introductory remarks and disposes of preliminary motions.
2. At the direction of the Presiding Officer, the parties make opening statements. DCR is the first to make an opening statement. The regulated party’s opening statement follows that of DCR.
3. At the direction of the Presiding Officer, each party, in turn, makes its case by calling witnesses; conducting direct, redirect, cross, and recross examination; and presenting evidence, proofs, and rebuttal. The presiding Officer is authorized to administer oaths and affirmations with respect to witnesses. DCR call its witnesses after which the regulated party calls his or her witnesses.
4. At the direction of the Presiding Officer, the parties make closing argument. DCR is the first to make a closing argument. The regulated party’s closing argument follows that of DCR.
5. At the direction of the Presiding Officer, the parties may submit proposed findings of fact and conclusions of law, if a party has not already done so.

#### **G. The Hearing Record and Transcript**

1. A typical record comprises the following items: (i) a letter of appointment for the hearing officer; (ii) the formal notice of the proceeding; (iii) any pre-hearing orders; (iv) any motions, briefs, pleadings, petitions, and

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<sup>83</sup> Va. Code § 2.2-2040.

intermediate rulings; (v) all evidence introduced, whether admitted or rejected; (vi) a statement of all matters officially noticed; (vii) proffers of proof and objections and rulings thereon; (viii) proposed findings of fact and conclusions of law and requested orders and exceptions; (ix) a transcript of the hearing; (x) any initial order, final order, or order on reconsideration; (xi) matters placed on the record after an *ex parte* communication; and (xii) any submissions to the Presiding Officer.

2. The Presiding Officer is responsible for assembling and preserving the record. If the Presiding Officer is a hearing officer, he or she remains responsible for the record until submitting it along with the recommendation to the decision-maker.

#### **H. Open Hearings**

1. In general, formal hearings are open to the public. Any decision to hold a closed hearing should be made with the consent of either the Board or DCR.
2. The Presiding Officer may control media and spectator access to the hearing in order to ensure that the media do not interfere with the dignity and smooth conduct of the hearing.

### **III. Post-Hearing Issues**

#### **A. Additional Submissions**

1. The Presiding Officer, on his or her own initiative or at the request of a party, may require additional submissions for the record, including findings of fact and conclusions of law, if none were submitted previously, and briefs on specific issues raised during the hearing.
2. The Presiding Officer may also afford the parties an opportunity to file transcript corrections, amended findings of fact and conclusions of law, memoranda of law in support of proposed findings of fact and conclusions of law, and replies to the opposing party's findings of fact and conclusions of law.

#### **B. Recommendation Package**

1. If the Presiding Officer is a hearing officer empowered to make a recommendation to the decision-maker (*i.e.*, either the Board or the Director of DCR, depending on the circumstances), he or she must deliver the recommendation to the decision-maker and the parties within **90 days** of the hearing, unless the parties agree in writing to a later date.
2. The recommendation for the case decision includes a brief summary of the issues and findings of fact and conclusions of law. The Presiding Officer may adopt either party's findings of fact and conclusions of law, in whole or in part but is not obliged to do so. The recommendation package should also include a list of all those who appeared at the hearing; the name and address of all those on whom the final decision should be served; a draft order, if appropriate, and the complete record of the hearing.
3. DCR will direct the Presiding Officer as to where to deliver the recommendation package including the complete record of the hearing.

#### **IV. The Case Decision**

##### **A. Deadlines for Final Decision**

1. The decision-maker has **30 days** from the date of delivery of the recommendation to render a final decision, unless the parties agree to a later date.
2. If the Board presides over the hearing, it must render a final decision within **90 days** of the hearing, unless the parties agree in writing to a later date.

##### **B. Contents of Final Decision**

1. The decision-maker (*i.e.*, the Board or the Director of DCR) may afford the parties an opportunity to submit comments on or exceptions to the Presiding Officer's recommendation. ***This does not extend the deadline for rendering the final decision, unless all the parties agree to a later date.***

2. Typically, the case decision is rendered in the form of findings of fact and conclusions of law. The decision-maker (*i.e.*, the Board or the Director of DCR) may adopt the Presiding Officer's recommendation in whole or in part or the findings of fact and conclusions of law submitted by one of the parties to the hearing, in whole or in part.

**C. Notice to the Regulated Party**

1. The decision-maker must notify the regulated party in writing of the case decision (Notice of Decision Letter). The Notice of Decision Letter should be delivered by certified mail, return receipt requested, within five days of the decision being rendered and should include a copy of the final case decision (*i.e.*, the findings of fact and conclusions of law).
2. The Notice of Decision Letter must inform the regulated party of his or her right to appeal. The following language may be included in the Notice of Decision Letter:

If you intend to appeal this decision to a Virginia court, you must provide notice to the Virginia Department of Conservation and Recreation, Office of the Director, 600 East Main Street, 24<sup>th</sup> Floor, Richmond, Virginia 23219. As provided by Rule 2A:2 of the Rules of the Supreme Court of Virginia, you have 30 days from the date of service of this decision (either the date you actually received this decision or the date on which it was mailed to you, whichever occurred first) within which to file a Notice of Appeal. That period of time increases by three days if you receive the decision by mail.

Please refer to Part Two A of the Rules of the Supreme Court of Virginia for a description of the required contents of the Notice of Appeal and additional requirements governing appeals from the decisions of administrative agencies.

There is a further requirement in 2A:3 that the party includes a transcript of the testimony along with notice.



# Appendix G

## Guidance Applicable to Litigation Referrals



## **G: GUIDANCE APPLICABLE TO LITIGATION REFERRALS**

The Office of the Attorney General of Virginia represents the Board, the Director, and DCR in any civil action to impose civil judicial sanctions.<sup>84</sup> Requests for representation in a civil action must come from either the Board or the Director, or both.

Prior to initiating any request for representation, DCR staff will meet informally with Agency Counsel to discuss all aspects of the case in question and determine whether or not it is suitable for referral to the Attorney General for civil action. As a part of the informal discussions, DCR staff will provide the Agency Counsel with any files, documents, photographs, or other evidence necessary to make an informed decision regarding the request.

If, after having discussed all aspects of the case, all concerned agree that the case should be referred for civil action, DCR will submit a referral package to the Attorney General with a formal, written request from the Board or Director, or both, for representation. The referral package will include a memorandum in support of litigation and a copy of the case file. The memorandum will include the names of the dam owners, the violations alleged, and the relief sought by the Commonwealth.

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<sup>84</sup> Va. Code § 2.2-507.

# Appendix H

## Guidance Applicable to Emergency Procedures



## **H: GUIDANCE APPLICABLE TO EMERGENCY PROCEDURES**

If an owner or the owner's engineer has determined that circumstances are impacting the integrity of the impounding structure that could result in the imminent failure of the impounding structure, the owner may initiate temporary repairs prior to Board approval. The owner is required to notify DCR within 24 hours of identifying the problem.<sup>85</sup>

When the Director finds an unsafe dam constituting an imminent danger to life or property, he shall immediately notify the Department of Emergency Management and confer with the owner who shall activate the Emergency Action Plan or Emergency Preparedness Plan, if appropriate to do so. The owner of a dam found to constitute an imminent danger to life or property shall take immediate corrective action. The dam owner shall take immediate corrective actions to remove the imminent danger. If the owner does not take appropriate and timely action to correct the danger found, the Governor shall have the authority to take immediate appropriate action, without the necessity for a hearing, to remove the imminent danger.<sup>86</sup>

The Attorney General may bring an action against the owner of the impounding structure for the Commonwealth's expenses in removing the imminent danger. There shall be a lien upon the owner's real estate for the Commonwealth's expenses in removing the imminent danger. The owner may avoid the Commonwealth's costs, and recover any damages, upon proving that the dam was known to be safe at the time such action was taken, and that the owner had provided or offered to immediately provide such proof to the Director before the action complained of was taken. Nothing herein shall in any way limit any authority existing under the Emergency Services and Disaster Law.<sup>87</sup>

The provisions of subsection A of this section notwithstanding, if the Director determines, after the report is issued, that changed circumstances justify reclassifying the deficiencies of an impounding structure as an imminent danger to life or property, the Director may proceed directly under § 10.1-613 for enforcement of his order, and the owner shall have the opportunity to contest the fact based upon which the administrative order was issued.

The Director, upon a determination that there is an unsafe condition at an impounding structure, is authorized to cause the lowering or complete draining of such impoundment until the unsafe condition has been corrected at the owner's expense and prior to any authorization to refill.

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<sup>85</sup> 4 VAC 50-20-220. The emergency notification does not relieve the owner of the need to obtain an alteration permit as soon as practicable nor shall the owner take corrective actions beyond those necessary to address the emergency.

<sup>86</sup> Va. Code § 10.1-608.

<sup>87</sup> Va. Code Va. § 10.1-608 and Code § 44-146.13 et seq.