WEST VIRGINIA CODE CHAPTER 22 ARTICLE 11

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§22-11-1. Short title.

This article may be known and cited as the Water Pollution Control Act.

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§22-11-2. Declaration of policy.

(a) It is declared to be the public policy of the State of West Virginia to maintain reasonable standards of purity and quality of the water of the state consistent with: (1) Public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, aquatic and plant life; and (3) the expansion of employment opportunities, maintenance and expansion of agriculture and the provision of a permanent foundation for healthy industrial development.

(b) It is also the public policy of the State of West Virginia that the water resources of this state with respect to the quantity thereof be available for reasonable use by all of the citizens of this state.

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§22-11-3. Definitions.

Unless the context in which used clearly requires a different meaning, as used in this article:

(1) "Activity" or "activities" means any activity or activities for which a permit is required by section seven of this article;

(2) "Board" means the environmental quality board, provided in article three, chapter twenty-two-b of this code;

(3) "Chief" means the director of the division of water and waste management of the Department of Environmental Protection;

(4) "Code" means the Code of West Virginia, 1931, as amended;

(5) "Department" means the Department of Environmental Protection;

(6) "Disposal system" means a system for treating or disposing of sewage, industrial wastes or other wastes, or the effluent therefrom, either by surface or underground methods, and includes sewer systems, the use of subterranean spaces, treatment works, disposal wells and other systems;

(7) "Disposal well" means any well drilled or used for the injection or disposal of treated or untreated sewage, industrial wastes or other wastes into underground strata;

(8) "Effluent limitation" means any restriction established on quantities, rates and concentrations of chemical, physical, biological and other constituents which are discharged into the waters of this state;

(9) "Establishment" means an industrial establishment, mill, factory, tannery, paper or pulp mill, mine, colliery, breaker or mineral processing operation, quarry, refinery, well and each and every industry or plant or works in the operation or process of which industrial wastes, sewage or other wastes are produced;

(10) "Industrial user" means those industries identified in the standard industrial classification manual, United States Bureau of the Budget, 1967, as amended and supplemented, under the category "division d--manufacturing" and other classes of significant waste producers identified under regulations issued by the director or the administrator of the United States environmental protection agency;

(11) "Industrial wastes" means any liquid, gaseous, solid or other waste substance, or a combination thereof, resulting from or incidental to any process of industry, manufacturing, trade or business, or from or incidental to the development, processing or recovery of any natural resources; and the admixture with such industrial wastes of sewage or other wastes, as hereinafter defined, is also "industrial waste" within the meaning of this article;

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(12) "Other wastes" means garbage, refuse, decayed wood, sawdust, shavings, bark and other wood debris and residues resulting from secondary processing; sand, lime, cinders, ashes, offal, night soil, silt, oil, tar, dyestuffs, acids, chemicals, heat or all other materials and substances not sewage or industrial wastes which may cause or might reasonably be expected to cause or to contribute to the pollution of any of the waters of the state;

(13) "Outlet" means the terminus of a sewer system or the point of emergence of any water-carried sewage, industrial wastes or other wastes, or the effluent therefrom, into any of the waters of this state, and includes a point source;

(14) "Person", "persons" or "applicant" means any industrial user, public or private corporation, institution, association, firm or company organized or existing under the laws of this or any other state or country; State of West Virginia; governmental agency, including federal facilities; political subdivision; county commission; municipal corporation; industry; sanitary district; public service district; drainage district; soil conservation district; watershed improvement district; partnership; trust; estate; person or individual; group of persons or individuals acting individually or as a group; or any legal entity whatever;

(15) "Point source" means any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock or vessel or other floating craft, from which pollutants are or may be discharged;

(16) "Pollutant" means industrial wastes, sewage or other wastes as defined in this section;

(17) "Pollution" means the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of the waters of the state;

(18) "Publicly owned treatment works" means any treatment works owned by the state or any political subdivision thereof, any municipality or any other public entity, for the treatment of pollutants;

(19) "Secretary" means the Secretary of the Department of Environmental Protection or such other person to whom the secretary has delegated authority or duties pursuant to section six or eight, article one of this chapter;

(20) "Sewage" means water-carried human or animal wastes from residences, buildings, industrial establishments or other places, together with such groundwater infiltration and surface waters as may be present;

(21) "Sewer system" means pipelines or conduits, pumping stations, force mains and all other constructions, facilities, devices and appliances appurtenant thereto, used for collecting or conducting sewage, industrial wastes or other wastes to a point of disposal or treatment;

(22) "Treatment works" means any plant, facility, means, system, disposal field, lagoon,

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pumping station, constructed drainage ditch or surface water intercepting ditch, diversion ditch above or below the surface of the ground, settling tank or pond, earthen pit, incinerator, area devoted to sanitary landfills or other works not specifically mentioned herein, installed for the purpose of treating, neutralizing, stabilizing, holding or disposing of sewage, industrial wastes or other wastes or for the purpose of regulating or controlling the quality and rate of flow thereof;

(23) "Water resources", "water" or "waters" means any and all water on or beneath the surface of the ground, whether percolating, standing, diffused or flowing, wholly or partially within this state, or bordering this state and within its jurisdiction, and includes, without limiting the generality of the foregoing, natural or artificial lakes, rivers, streams, creeks, branches, brooks, ponds (except farm ponds, industrial settling basins and ponds and water treatment facilities), impounding reservoirs, springs, wells, watercourses and wetlands; and

(24) "Well" means any shaft or hole sunk, drilled, bored or dug into the earth or into underground strata for the extraction or injection or placement of any liquid or gas, or any shaft or hole sunk or used in conjunction with such extraction or injection or placement. The term "well" does not include any shaft or hole sunk, drilled, bored or dug into the earth for the sole purpose of core drilling or pumping or extracting therefrom potable, fresh or usable water for household, domestic, industrial, agricultural or public use.

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§22-11-4. General powers and duties of director with respect to pollution.

(a) In addition to all other powers and duties the director has and may exercise, subject to specific grants of authority to the chief or the board in this article or elsewhere in this code, the director has the following powers and authority and shall perform the following duties:

(1) To perform any and all acts necessary to carry out the purposes and requirements of this article and of the "Federal Water Pollution Control Act," 33 U.S.C. §1251 *et seq.*, as amended, relating to this state's participation in the "National Pollutant Discharge Elimination System," 33 U.S.C. §1342, established under that act;

(2) To encourage voluntary cooperation by all persons in the conservation, improvement, and development of water resources and in controlling and reducing the pollution of the waters of this state, and to advise, consult, and cooperate with all persons, all agencies of this state, the federal government, or other states, and with interstate agencies in the furtherance of the purposes of this article, and to this end and for the purpose of studies, scientific or other investigations, research, experiments, and demonstrations pertaining thereto, the division may receive moneys from such agencies, officers, and persons on behalf of the state. The division shall pay all moneys so received into a special fund hereby created in the state Treasury, which fund shall be expended under the direction of the director solely for the purpose or purposes for which the grant, gift, or contribution was made;

(3) To encourage the formulation and execution of plans by cooperative groups or associations of municipal corporations, industries, industrial users, and other users of waters of the state, who, jointly or severally, are or may be the source of pollution of such waters, for the control and reduction of pollution;

(4) To encourage, participate in, or conduct, or cause to be conducted studies, scientific or other investigations, research, experiments, and demonstrations relating to the water resources of the state and water pollution and its causes, control and reduction, and to collect data with respect thereto, all as may be deemed advisable and necessary to carry out the purposes of this article;

(5) To study and investigate all problems concerning water flow, water pollution, and the control and reduction of pollution of the waters of the state, and to make reports and recommendations with respect thereto;

(6) To collect and disseminate information relating to water pollution and the control and reduction thereof;

(7) To develop a public education and promotion program to aid and assist in publicizing the need for, and securing support for, pollution control and abatement;

(8) To sample ground and surface water with sufficient frequency to ascertain the standards of purity or quality from time to time of the waters of the state;

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(9) To develop programs for the control and reduction of the pollution of the waters of the state;

(10) To exercise general supervision over the administration and enforcement of the provisions of this article, and all rules, permits and orders issued pursuant to the provisions of this article, §22-11-1 *et seq.*, §22-11A-1 *et seq.*, §22-11B-1 *et seq.*, of this code and §22B-1-1 *et seq*. of this code;

(11) In cooperation with the college of engineering at West Virginia University and the schools and departments of engineering at other institutions of higher education operated by this state, to conduct studies, scientific or other investigations, research, experiments, and demonstrations in an effort to discover economical and practical methods for the elimination, disposal, control, and treatment of sewage, industrial wastes, and other wastes, and the control and reduction of water pollution, and to this end, the director may cooperate with any public or private agency and receive therefrom, on behalf of the state, and for deposit in the state Treasury, any moneys which such agency may contribute as its part of the expenses thereof, and all gifts, donations or contributions received as aforesaid shall be expended by the director according to the requirements or directions of the donor or contributor without the necessity of an appropriation therefor, except that an accounting thereof shall be made in the fiscal reports of the division;

(12) To require the prior submission of plans, specifications, and other data relative to, and to inspect the construction and operation of, any activity or activities in connection with the issuance and revocation of such permits as are required by this article, §22-11A-1 *et seq*. and §22-11B-1 *et seq.*, of this code or the rules promulgated thereunder;

(13) To require any and all persons directly or indirectly discharging, depositing, or disposing of treated or untreated sewage, industrial wastes or other wastes, or the effluent therefrom, into or near any waters of the state or into any underground strata, and any and all persons operating an establishment which produces or which may produce or from which escapes, releases or emanates or may escape, release or emanate treated or untreated sewage, industrial wastes or other wastes, or the effluent therefrom, into or near any waters of the state or into any underground strata, to file with the division such information as the director may require in a form or manner prescribed for such purpose, including, but not limited to, data as to the kind, characteristics, amount, and rate of flow of any such discharge, deposit, escape, release, or disposition;

(14) To adopt, modify, or repeal procedural rules and interpretive rules in accordance with the provisions of Chapter 29A of this code administering and implementing the powers, duties and responsibilities vested in the director by the provisions of this article, and §22-11A-1 *et seq*. and §22-11B-1 *et seq*. of this code;

(15) To cooperate with interstate agencies for the purpose of formulating, for submission to the Legislature, interstate compacts and agreements relating to:

(A) The control and reduction of water pollution; and

(B) the state's share of waters in watercourses bordering the state;

(16) To adopt, modify, repeal, and enforce rules, in accordance with the provisions of chapter twenty-nine-a of this code:

(A) Implementing and making effective the declaration of policy contained in section one of this article and the powers, duties and responsibilities vested in the director and the chief by the provisions of this article and otherwise by law;

(B) preventing, controlling and abating pollution; and

(C) facilitating the state's participation in the "National Pollutant Discharge Elimination System" pursuant to the "Federal Water Pollution Control Act," as amended: *Provided*, That no rule adopted by the director shall specify the design of equipment, type of construction or particular method which a person shall use to reduce the discharge of a pollutant; and

(17) To advise all users of water resources as to the availability of water resources and the most practicable method of water diversion, use, development, and conservation.

(b) Whenever required to carry out the objectives of this article, §22-11A-1 *et seq*. or §22-11B-1 *et seq*. of this code, the director shall require the owner or operator of any point source or establishment to:

(i) Establish and maintain such records;

(ii) make such reports;

(iii) install, use, and maintain such monitoring equipment or methods;

(iv) sample such effluents in accordance with such methods, at such locations, at such intervals, and in such manner as the director shall prescribe; and

(v) provide such other information as the director may reasonably require.

(c) The director upon presentation of credentials:

(i) Has a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under subsection (b) of this section are located; and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under subsection (b) of this section, and sample any streams in the area as well as sample any effluents which the owner or operator of such source is required to sample under subsection (b) of this section. Nothing in this subsection eliminates

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any obligation to follow any process that may be required by law.

(d) The director may investigate and ascertain the need and factual basis for the establishment of public service districts as a means of controlling and reducing pollution from unincorporated communities and areas of the state, investigate and ascertain, with the assistance of the Public Service Commission, the financial feasibility and projected financial capability of the future operation of any such public service district or districts, and to present reports and recommendations thereon to the county commissions of the areas concerned, together with a request that such county commissions create a public service district or districts, as therein shown to be needed and required and as provided in §16-13A-1 *et seq*. of this code. In the event a county commission fails to act to establish a county-wide public service district or districts, the director shall act jointly with the Commissioner of the Bureau of Public Health to further investigate and ascertain the financial feasibility and projected financial capability and, subject to the approval of the Public Service Commission, order the county commission to take action to establish such public service district or districts as may be necessary to control, reduce, or abate the pollution, and when so ordered, the county commission members must act to establish such a county-wide public service district or districts.

(e) The director may enter at all reasonable times upon any private or public property for the purpose of making surveys, examinations, investigations, and studies needed in the gathering of facts concerning the water resources of the state and their use, subject to responsibility for any damage to the property entered. Upon entering, and before making any survey, examination, investigation, and study, such person shall immediately present himself or herself to the occupant of the property. Upon entering property used in any manufacturing, mining, or other commercial enterprise, or by any municipality or governmental agency or subdivision, and before making any survey, examination, investigation, and study, such person shall immediately present himself or herself to the person in charge of the operation, and if he or she is not available, to a managerial employee. All persons shall cooperate fully with the person entering such property for such purposes. Upon refusal of the person owning or controlling such property to permit such entrance or the making of such surveys, examinations, investigations, and studies, the director may apply to the circuit court of the county in which such property is located, or to the judge thereof in vacation, for an order permitting such entrance or the making of such surveys, examinations, investigations, and studies; and jurisdiction is hereby conferred upon such court to enter such order upon a showing that the relief asked is necessary for the proper enforcement of this article: *Provided*, That nothing in this subsection eliminates any obligation to follow any process that may be required by law.

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§22-11-5. Water areas beautification; investigations; law enforcement.

The division shall maintain a program and practices in the husbandry of waters of the state and the lands immediately adjacent thereto. The director shall make such investigations and surveys, conduct such schools and public meetings and take such other steps as may be expedient in the conservation, beautification, improvement and use of all such water areas of the state. The director shall cooperate with the Division of Natural Resources' chief law-enforcement officer in enforcing the provisions of law prohibiting the disposal of litter in, along and near such water areas.

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§22-11-6. Requirement to comply with standards of water quality and effluent limitations.

(a) All persons affected by rules establishing water quality standards and effluent limitations shall promptly comply with the rules: Provided, That:

(1) Where necessary and proper, the secretary may specify a reasonable time for persons not complying with the standards and limitations to comply with the rules and, upon the expiration of that period of time, the secretary shall revoke or modify any permit previously issued which authorized the discharge of treated or untreated sewage, industrial wastes, or other wastes into the waters of this state which result in reduction of the quality of the waters below the standards and limitations established therefor by rules of the board or secretary;

(2) For purposes of both this article and sections 309 and 505 of the federal Water Pollution Control Act, compliance with a permit issued pursuant to this article shall be considered compliance for purposes of both this article and sections 301, 302, 303, 306, 307, and 403 of the federal Water Pollution Control Act and with all applicable state and federal water quality standards, except for any standard imposed under section 307 of the federal Water Pollution Control Act for a toxic pollutant injurious to human health. Notwithstanding any provision of this code or rule or permit condition to the contrary, water quality standards themselves shall not be considered effluent standards or limitations for the purposes of both this article and sections 309 and 505 of the federal Water Pollution Control Act and may not be independently or directly enforced or implemented except through the development of terms and conditions of a permit issued pursuant to this article. Nothing in this section, however, prevents the secretary from modifying, reissuing, or revoking a permit during its term. The provisions of this section addressing compliance with a permit are intended to apply to all existing and future discharges and permits without the need for permit modifications; and

(3) The Legislature finds that there are concerns within West Virginia regarding the applicability of the research underlying the federal selenium criteria to a state such as West Virginia which has high precipitation rates and free-flowing streams, and that the alleged environmental impacts that were documented in applicable federal research have not been observed in West Virginia and, further, that considerable research is required to determine if selenium is having an impact on West Virginia streams, to validate or determine the proper testing methods for selenium, and to better understand the chemical reactions related to selenium mobilization in water.

(4) The Legislature finds that the EPA has been contemplating a revision to the federally recommended criteria for several years, but has yet to issue a revised standard.

(5) Because of the uncertainty regarding the applicability of the current selenium standard, the secretary is hereby directed to develop within six months of the effective date of this

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subdivision an implementation plan for the current selenium standard that will include, at minimum, the following:

(A) Implementing the criteria as a threshold standard;

(B) A monitoring plan that will include chemical speciation of any selenium discharge;

(C) A fish population survey and monitoring plan that will be implemented at a representative location to assess any possible impacts from selenium discharges if the threshold criteria are exceeded; and

(D) The results of the monitoring will be reported to the department for use in the development of state-specific selenium criteria.

(6) Within 24 months of the effective date of this subdivision, the secretary shall propose rules for legislative approval in accordance with §29A-3-1 et seq. of this code which establish a state-specific selenium standard that protects aquatic life. Concurrent with proposing a legislative rule, the secretary shall also submit the proposed standard and supporting documentation to the administrator of the Environmental Protection Agency. The secretary shall also consult with and consider research and data from the West Virginia Water Research Institute at West Virginia University, the regulated community, and other appropriate groups in developing the state-specific selenium standard.

(7) Within 30 days of the effective date of this section, the secretary shall promulgate an emergency rule revising the statewide aluminum water quality criteria for the protection of aquatic life to incorporate aluminum criteria values using a hardness-based equation. Concurrent with issuing an emergency rule, the secretary shall also submit the proposed revisions and supporting documentation to the administrator of the Environmental Protection Agency.

(8) The secretary shall, within 90 days of receipt of any completed request for a site-specific water quality criterion, approve or deny the request. Any denial or approval of an application shall detail the specific basis for the denial or approval and any revisions needed to the application. Any denial or approval of a request may be appealed to the environmental quality board pursuant to §22-11-21 of this code.

(b) The secretary may issue water pollution control permits that contain water quality-based effluent limits that are adjusted to reflect credit for pollutants in the permittee’s intake water (net limits).

(c) The secretary may not set benchmarks for substances in, or conditions of, discharges of stormwater that are more restrictive than the acute aquatic life water quality criterion, the federal benchmark, the chronic aquatic life water quality criterion, or the ambient aquatic life advisory concentration.

(d) Upon request by an applicant for a permit issued in accordance with this article, the

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secretary shall establish effluent limits for stormwater that are developed in accordance with mixing zones that are appropriate for relevant conditions.

(e) The secretary shall promptly develop guidance for determining how benchmarks in permits issued pursuant to this article demonstrate the adequacy of stormwater best management practices.

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§22-11-7. Cooperation with other governments and agencies.

The office of water resources is hereby designated as the water pollution control agency for this state for all purposes of federal legislation and is hereby authorized to take all action necessary or appropriate to secure to this state the benefits of said legislation. In carrying out the purposes of this section, the chief is hereby authorized to cooperate with the United States environmental protection agency and other agencies of the federal government, other states, interstate agencies and other interested parties in all matters relating to water pollution, including the development of programs for controlling and reducing water pollution and improving the sanitary conditions of the waters of the state; to apply for and receive, on behalf of this state, funds made available under the aforesaid federal legislation on condition that all moneys received from any federal agency as herein provided shall be paid into the state Treasury and shall be expended, under the direction of the director, solely for purposes for which the grants are made; to approve projects for which applications for loans or grants under the federal legislation are made by any municipality (including any city, town, district or other public body created by or pursuant to the laws of this state and having jurisdiction over the disposal of sewage, industrial wastes or other wastes) or agency of this state or by any interstate agency; and to participate through authorized representatives in proceedings under the federal legislation to recommend measures for the abatement of water pollution originating in this state. The Governor may give consent on behalf of this state to requests by the administrator of the United States environmental protection agency to the Attorney General of the United States for the bringing of actions for the abatement of such pollution. Whenever a federal law requires the approval or recommendation of a state agency or any political subdivision of the state in any matter relating to the water resources of the state, the director, subject to approval of the Legislature, is hereby designated as the sole person to give the approval or recommendation required by the federal law, unless the federal law specifically requires the approval or recommendation of some other state agency or political subdivision of the state.

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§22-11-7a. Certification agreements; required provisions.

(a) Any applicant for the water quality certification that seeks certification of activities covered by the United States Army Corps of Engineers permits issued in accordance with 33 U.S.C. §1344 and 33 C.F.R. Parts 323 or 330 may be issued a certification in accordance with the legislative rules entitled Rules for Individual State Certification of Activities Requiring a Federal Permit, 47 C.S.R. 5A.

(1) The proposed activity shall comply with all applicable state and federal laws, rules, and regulations.

(2) The secretary shall propose rules for legislative approval in accordance with §29A-3-1 et seq. of this code, for the purpose of implementing the provisions of this section which rules shall include, but not be limited to, the following:

(A) Establishing all necessary operational and performance requirements for a person undertaking activities covered by this section;

(B) Modifying the provisions of this section, when necessary and appropriate to bring the provisions of this section into compliance with state or federal law or regulation; and

(C) Establishing the specific operational requirements for the activity consistent with this section appropriate to protect the waters of this state during and following the activity.

(b) The Joint Committee on Government and Finance may undertake or facilitate a study of the impact of mountaintop mining and valley fills upon the State of West Virginia.

(1) To facilitate the study, the Joint Committee on Government and Finance is further authorized to coordinate with and seek funding from appropriate federal agencies to facilitate the study including, but not limited to: The federal Environmental Protection Agency, Army Corps of Engineers, Office of Surface Mining Reclamation and Enforcement, and Fish and Wildlife Service.

(2) In order to facilitate the research, the Joint Committee on Government and Finance shall appoint a council to coordinate and direct the research. The composition of the council shall be determined by the joint committee, but shall include representatives from the various interested parties as determined solely by the joint committee.

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§22-11-7b. Water quality standards; implementation of antidegradation procedures; procedure to determine comp1iance with the biologic component of the narrative water quality standard.

NOTE: During the 2017 Regular Session of the Legislature, this section was amended by House Bill 2506 and Senate Bill 687 and there has been no judicial ruling to determine which, if either, amendments prevail. Both versions are provided here.

As amended by House Bill 2506:

(a) All authority to propose rules for legislative approval and implement water quality standards is vested in the Secretary of the Department of Environmental Protection.

(b) All meetings with the secretary or any employee of the department and any interested party which are convened for the purpose of making a decision or deliberating toward a decision as to the form and substance of the rule governing water quality standards or variances thereto shall be held in accordance with article nine-a, chapter six of this code. When the secretary is considering the form and substance of the rules governing water quality standards, the following are not meetings pursuant to article nine-a, chapter six of this code: (i) Consultations between the department's employees or its consultants, contractors or agents; (ii) consultations with other state or federal agencies and the department's employees or its consultants, contractors or agents; or (iii) consultations between the secretary, the department's employees or its consultants, contractors or agents with any interested party for the purpose of collecting facts and explaining state and federal requirements relating to a site specific change or variance.

(c) In order to carry out the purposes of this chapter, the secretary shall propose rules for legislative approval in accordance with article three, chapter twenty-nine-a of this code setting standards of water quality applicable to both the surface waters and groundwaters of this state. Standards of quality with respect to surface waters shall protect the public health and welfare, wildlife, fish and aquatic life and the present and prospective future uses of the water for domestic, agricultural, industrial, recreational, scenic and other legitimate beneficial uses thereof. The water quality standards of the secretary may not specify the design of equipment, type of construction or particular method which a person shall use to reduce the discharge of a pollutant. For implementing human health criteria for the protection of drinking water, the Secretary shall calculate permit limits using the harmonic mean flow and may determine the point of compliance for a permittee’s discharge pursuant to the mixing zone provisions of the Legislative rule entitled Requirements Governing Water Quality Standards, 47 C.S.R. 2: Provided, That the Secretary may allow mixing zones to overlap, but not to go beyond a point one-half mile upstream of a public water supply. At locations where mixing zones are allowed to overlap, the Secretary shall require permittees to indicate on their required signage an indication that mixing zones overlap in a particular vicinity.

(d) The secretary shall establish the antidegradation implementation procedures as required

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by 40 C. F. R. 131.12(a) which apply to regulated activities that have the potential to affect water quality. The secretary shall propose for legislative approval, pursuant to article three, chapter twenty-nine-a of the code, legislative rules to establish implementation procedures which include specifics of the review depending upon the existing uses of the water body segment that would be affected, the level of protection or "tier" assigned to the applicable water body segment, the nature of the activity and the extent to which existing water quality would be degraded. Any final classification determination of a water as a Tier 2.5 water (Water of Special Concern) does not become effective until that determination is approved by the Legislature through the legislative rule-making process as provided in article three, chapter twenty-nine-a of the code.

(e) All remining variances shall be applied for and considered by the secretary and any variance granted shall be consistent with 33 U. S. C. Section 1311(p) of the Federal Water Control Act. At a minimum, when considering an application for a remining variance the secretary shall consider the data and information submitted by the applicant for the variance; and comments received at a public comment period and public hearing. The secretary may not grant a variance without requiring the applicant to improve the instream water quality as much as is reasonably possible by applying best available technology economically achievable using best professional judgment. Any such requirement shall be included as a permit condition. The secretary may not grant a variance without a demonstration by the applicant that the coal remining operation will result in the potential for improved instream water quality as a result of the remining operation. The secretary may not grant a variance where he or she determines that degradation of the instream water quality will result from the remining operation.

(f) The secretary shall propose rules measuring compliance with the biologic component of West Virginia's narrative water quality standard requires evaluation of the holistic health of the aquatic ecosystem and a determination that the stream: (i) Supports a balanced aquatic community that is diverse in species composition; (ii) contains appropriate trophic levels of fish, in streams that have flows sufficient to support fish populations; and (iii) the aquatic community is composed of benthic invertebrate assemblages sufficient to perform the biological functions necessary to support fish communities within the assessed reach, or, if the assessed reach has insufficient flows to support a fish community, in those downstream reaches where fish are present. The secretary shall propose rules for legislative approval in accordance with article three, chapter twenty-nine-a of this code that implement the provisions of this subsection. Rules promulgated pursuant to this subsection may not establish measurements for biologic components of West Virginia's narrative water quality standards that would establish standards less protective than requirements that exist at the time of enactment of the amendments to this subsection by the Legislature during the 2012 regular session.

As amended by Senate Bill 687:

(a) All authority to promulgate rules and implement water quality standards is vested in the Secretary of the Department of Environmental Protection.

(b) All meetings with the secretary or any employee of the department and any interested party which are convened for the purpose of making a decision or deliberating toward a decision as to the form and substance of the rule governing water quality standards or variances thereto shall be held in accordance with the provisions of article nine-a, chapter six of this code. When the secretary is considering the form and substance of the rules governing water quality standards, the following are not meetings pursuant to article nine-a, chapter six of this code: (i) Consultations between the department's employees or its consultants, contractors or agents; (ii) consultations with other state or federal agencies and the department's employees or its consultants, contractors or agents; or (iii) consultations between the secretary, the department's employees or its consultants, contractors or agents with any interested party for the purpose of collecting facts and explaining state and federal requirements relating to a site specific change or variance.

(c) In order to carry out the purposes of this chapter, the secretary shall promulgate legislative rules in accordance with the provisions of article three, chapter twenty-nine-a of this code setting standards of water quality applicable to both the surface waters and groundwaters of this state. Standards of quality with respect to surface waters shall protect the public health and welfare, wildlife, fish and aquatic life and the present and prospective future uses of the water for domestic, agricultural, industrial, recreational, scenic and other legitimate beneficial uses thereof. The water quality standards of the secretary may not specify the design of equipment, type of construction or particular method which a person shall use to reduce the discharge of a pollutant.

(d) The secretary shall establish the antidegradation implementation procedures as required by 40 C. F. R. 131.12(a) which apply to regulated activities that have the potential to affect water quality. The secretary shall propose for legislative approval, pursuant to article three, chapter twenty-nine-a of the code, legislative rules to establish implementation procedures which include specifics of the review depending upon the existing uses of the water body segment that would be affected, the level of protection or "tier" assigned to the applicable water body segment, the nature of the activity and the extent to which existing water quality would be degraded. Any final classification determination of a water as a Tier 2.5 water (Water of Special Concern) does not become effective until that determination is approved by the Legislature through the legislative rule-making process as provided in article three, chapter twenty-nine-a of the code.

(e) All remining variances shall be applied for and considered by the secretary and any variance granted shall be consistent with 33 U. S. C. Section 1311(p) of the Federal Water Control Act. At a minimum, when considering an application for a remining variance the secretary shall consider the data and information submitted by the applicant for the variance; and comments received at a public comment period and public hearing. The secretary may not grant a variance without requiring the applicant to improve the instream water quality as much as is reasonably possible by applying best available technology economically achievable using best professional judgment. Any such requirement will be included as a permit condition. The secretary may not grant a variance without a demonstration by the applicant that the coal remining operation will result in the potential

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for improved instream water quality as a result of the remining operation. The secretary may not grant a variance where he or she determines that degradation of the instream water quality will result from the remining operation.

(f) The secretary shall propose rules measuring compliance with the aquatic life component of West Virginia's narrative water quality standard requires evaluation of the holistic health of the aquatic ecosystem and a determination that the stream: (i) contains appropriate trophic levels of fish, in streams that have flows sufficient to support fish populations; and (ii) the aquatic community is composed of benthic invertebrate assemblages sufficient to perform the biological functions necessary to support fish communities within the assessed reach, or, if the assessed reach has insufficient flows to support a fish community, in those downstream reaches where fish are present. The secretary shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code that implement the provisions of this subsection. Rules promulgated pursuant to this subsection may not establish measurements for biologic components of West Virginia's narrative water quality standards that would establish standards less protective than legislatively-approved rules that existed at the time of enactment of the amendments to this subsection by the Legislature during the 2012 regular session.

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§22-11-8. Prohibitions; permits required.

(a) The secretary may, after public notice and opportunity for public hearing, issue a permit for the discharge or disposition of any pollutant or combination of pollutants into waters of this state upon condition that the discharge or disposition meets or will meet all applicable state and federal water quality standards and effluent limitations and all other requirements of this article and article three, chapter twenty-two-b of this code. While permits shall contain conditions that are designed to meet all applicable state and federal water quality standards and effluent limitations, water quality standards themselves shall not be incorporated wholesale either expressly or by reference as effluent standards or limitations in a permit issued pursuant to this article.

(b) It is unlawful for any person, unless the person holds a permit therefor from the department, which is in full force and effect, to:

(1) Allow sewage, industrial wastes or other wastes, or the effluent therefrom, produced by or emanating from any point source, to flow into the waters of this state;

(2) Make, cause or permit to be made any outlet, or substantially enlarge or add to the load of any existing outlet, for the discharge of sewage, industrial wastes or other wastes, or the effluent therefrom, into the waters of this state;

(3) Acquire, construct, install, modify or operate a disposal system or part thereof for the direct or indirect discharge or deposit of treated or untreated sewage, industrial wastes or other wastes, or the effluent therefrom, into the waters of this state, or any extension to or addition to the disposal system;

(4) Increase in volume or concentration any sewage, industrial wastes or other wastes in excess of the discharges or disposition specified or permitted under any existing permit;

(5) Extend, modify or add to any point source, the operation of which would cause an increase in the volume or concentration of any sewage, industrial wastes or other wastes discharging or flowing into the waters of the state;

(6) Construct, install, modify, open, reopen, operate or abandon any mine, quarry or preparation plant, or dispose of any refuse or industrial wastes or other wastes from the mine or quarry or preparation plant: Provided, That the department's permit is only required wherever the aforementioned activities cause, may cause or might reasonably be expected to cause a discharge into or pollution of waters of the state, except that a permit is required for any preparation plant: Provided, however, That unless waived in writing by the secretary, every application for a permit to open, reopen or operate any mine, quarry or preparation plant or to dispose of any refuse or industrial wastes or other wastes from the mine or quarry or preparation plant shall contain a plan for abandonment of the facility or operation, which plan shall comply in all respects to the requirements of this article. The plan of abandonment is subject to modification or amendment upon application by the permit holder

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to the secretary and approval of the modification or amendment by the secretary; or

(7) Operate any disposal well for the injection or reinjection underground of any industrial wastes, including, but not limited to, liquids or gases, or convert any well into such a disposal well or plug or abandon any such disposal well.

(c) Where a person has a number of outlets emerging into the waters of this state in close proximity to one another, the outlets may be treated as a unit for the purposes of this section, and only one permit issued for all the outlets.

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§22-11-9. Form of application for permit; information required.

The chief shall prescribe a form of application for all permits for any activity specified in section eight of this article and, notwithstanding any other provision of law to the contrary, no other discharge permit or discharge authorization from any other state department, agency, commission, board or officer is required for such activity except that which is required from the office of miners' health, safety and training pursuant to section seventy-six, article two, chapter twenty-two-a of this code. All applications must be submitted on a form as prescribed above. An applicant shall furnish all information reasonably required by any such form, including without limiting the generality of the foregoing, a plan of maintenance and proposed method of operation of the activity or activities. Until all such required information is furnished, an application is not a complete application. The division shall protect any information (other than effluent data) contained in such permit application form, or other records, reports or plans as confidential upon a showing by any person that such information, if made public, would divulge methods or processes entitled to protection as trade secrets of such person. If, however, the information being considered for confidential treatment is contained in a national pollutant discharge elimination form, the chief or board shall forward such information to the regional administrator of the United States environmental protection agency for concurrence in any determination of confidentiality.

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§22-11-10. Water Quality Management Fund established; permit application fees; annual permit fees; dedication of proceeds; rules.

(a) The special revenue fund designated the Water Quality Management Fund established in the State Treasury on July 1, 1989, is continued.

(b) The following shall be deposited into the Water Quality Management Fund: (i) permit application fees and annual permit fees established and collected pursuant to this section; (ii) any interest or surcharge assessed and collected by the secretary; (iii) interest accruing on investments and deposits of the fund; and (iv) any other moneys designated by the secretary. The secretary shall expend the proceeds of the Water Quality Management Fund for the review of initial permit applications, renewal permit applications, and permit issuance activities.

(c) The secretary shall propose rules for legislative approval in accordance with the provisions of §29A-1-1 *et seq*. of this code, to establish a schedule of application fees for all applications except for surface coal mining operations as defined in §22-3-13 of this code. The applicant shall submit the appropriate fee to the department with the application filed pursuant to this article for any state water pollution control permit or national pollutant discharge elimination system permit. The schedule of application fees shall be designed to establish reasonable categories of permit application fees based upon the complexity of the permit application review process required by the department pursuant to the provisions of this article and the rules promulgated under this article. The department may not process any permit application pursuant to this article until the required permit application fee has been received.

(d) The secretary shall propose rules for legislative approval in accordance with the provisions of §29A-1-1 *et seq*. of this code to establish a schedule of permit fees to be assessed annually upon each person holding a state water pollution control permit or national pollutant discharge elimination system permit issued pursuant to this article except for permits held by surface coal mining operations as defined in §22-3-1 *et seq*. of this code. Each person holding a permit shall pay the prescribed annual permit fee to the department. Any person holding a permit for a home aerator of 600 gallons and under is not required to pay an annual permit fee. The schedule of annual permit fees shall be designed to establish reasonable categories of annual permit fees based upon the relative potential of categories or permits to degrade the waters of the state. The secretary may declare any permit issued pursuant to this article void when the annual permit fee is more than 90 days past due. Voiding of the permit will only become effective upon the date the secretary mails, by certified mail, written notice to the permittee’s last known address notifying the permittee that the permit has been voided.

(e) The secretary shall file a quarterly report with the Joint Committee on Government and Finance setting forth the fees established and collected pursuant to this section.

(f) On July 1, 2022, and each year thereafter a $1,000 fee shall be assessed for permit

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applications and a $3,000 fee shall be assessed for permit renewals for surface coal mining operations, as defined in §22-3-1 *et seq*. of this code. Annually on July 1, a $2,000 fee shall be assessed for any application for major permit modifications and a $1,000 fee for minor permit modifications for surface coal mining operations, as defined in §22-3-1 *et seq*. of this code. On July 1, 2022, and each year thereafter a $3,000 fee shall be assessed for any application for permit reissuance and a $2,000 fee for permit transfer for surface coal mining operations, as defined in §22-3-1 *et seq*. of this code. Beginning July 1, 2022, and every year thereafter, an annual permit fee of $2,000 shall be assessed on the issuance anniversary dates of all permits issued pursuant to this article for surface coal mining operations as defined in §22-3-1 *et seq*. of this code. Beginning July 1, 2022, and each year thereafter, an application for a water quality certification for activities covered by United States Army Corps of Engineers permits issued pursuant to 33 U.S.C. § 1344 and 33 C.F.R. Parts 323 or 330, in accordance with the legislative rules entitled Rules for Individual State Certification of Activities Requiring a Federal Permit, 47 C.F.R. 5A, must be accompanied by a $500 fee. For all other categories of permitting actions pursuant to this article related to surface coal mining operations, the secretary shall propose rules for legislative approval in accordance with the provisions of §29A-1-1 *et seq*. of this code to establish a schedule of permitting fees.

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§22-11-11. Procedure concerning permits required under article; transfer of permits; prior permits.

(a) The chief or his or her duly authorized representatives shall conduct such investigation as is deemed necessary and proper in order to determine whether any such application should be granted or denied. In making such investigation and determination as to any application pertaining solely to sewage, the chief shall consult with the director of the office of environmental health services of the state bureau of public health, and in making such investigation and determination as to any application pertaining to any activity specified in subdivision (7), subsection (b), section eight of this article, the chief shall consult with the director of the state geological and economic survey and the chief of the office of oil and gas of the division, and all such persons shall cooperate with the chief and assist him or her in carrying out the duties and responsibilities imposed upon him or her under the provisions of this article and the rules of the director and board; such cooperation shall include, but not be limited to, a written recommendation approving or disapproving the granting of the permit and the reason or reasons for such recommendation, which recommendation and the reason or reasons therefor shall be submitted to the chief within the specified time period prescribed by rules of the director.

(b) The division's permit shall be issued upon such reasonable terms and conditions as the chief may direct if (1) the application, together with all supporting information and data and other evidence, establishes that any and all discharges or releases, escapes, deposits and disposition of treated or untreated sewage, industrial wastes or other wastes, or the effluent therefrom, resulting from the activity or activities for which the application for a permit was made will not cause pollution of the waters of this state or violate any effluent limitations or any rules of the board or director: Provided, That the chief may issue a permit whenever in his or her judgment the water quality standards of the state may be best protected by the institution of a program of phased pollution abatement which under the terms of the permit may temporarily allow a limited degree of pollution of the waters of the state; and (2) in cases wherein it is required, such applicant shall include the name and address of the responsible agent as set forth in subsection (e), section section six, article six of this chapter.

(c) Each permit issued under this article shall have a fixed term not to exceed five years: Provided, That when the applicant, in accordance with agency rules, has made a timely and complete application for permit reissuance, the permit term may be extended by the chief, at his or her discretion. An extension may be granted for a period not to exceed twelve months beyond its expiration date. Successive extensions may be granted for periods not to exceed twelve months if the chief determines additional time is necessary in order to process the application for permit reissuance. Upon expiration of a permit, a new permit may be issued by the chief upon condition that the discharges or releases, escapes, deposits and disposition thereunder meet or will meet all applicable state and federal water quality standards, effluent limitations and all other requirements of this article.

(d) An application for a permit incident to remedial action in accordance with the provisions of section sixteen of this article shall be processed and decided as any other application for a

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permit required under the provisions of section eight of this article.

(e) A complete application for any permit shall be acted upon by the chief, and the division's permit delivered or mailed, or a copy of any order of the chief denying any such application delivered or mailed to the applicant by the chief, within a reasonable time period as prescribed by rules of the director.

(f) When it is established that an application for a permit should be denied, the chief shall make and enter an order to that effect, which order shall specify the reasons for such denial, and shall cause a copy of such order to be served on the applicant by registered or certified mail. The chief shall also cause a notice to be served with a copy of such order, which notice shall advise the applicant of the right to appeal to the board by filing a notice of appeal on the form prescribed by the board for such purpose, with the board, in accordance with the provisions of, and within the time specified in, section seven, article one, chapter twenty-two-b of this code. However, an applicant may alter the plans and specifications for the proposed activity and submit a new application for any such permit, in which event the procedure hereinbefore outlined with respect to an original application shall apply.

(g) A permit is transferable to another person upon proper notification to the chief and in accordance with applicable rules. Such transfer does not become effective until it is reflected in the records of the office of water resources.

(h) All permits for the discharge of sewage, industrial wastes or other wastes into any waters of the state issued by the water resources board prior to July 1, 1964, and all permits heretofore issued under the provisions of former article five-a, chapter twenty of this code, and which have not been heretofore revoked, are subject to review, revocation, suspension, modification and reissuance in accordance with the terms and conditions of this article and the rules promulgated thereunder. Any order of revocation, suspension or modification made and entered pursuant to this subsection shall be upon at least twenty days' notice and shall specify the reasons for such revocation, suspension or modification and the chief shall cause a copy of such order, together with a copy of a notice of the right to appeal to the board as provided for in section twelve of this article, to be served upon the permit holder as specified in said section twelve.

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§22-11-12. Inspections; orders to compel compliance with permits; service of orders.

After issuance of the division's permit for any activity the director may make field inspections of the work on the activity, and, after completion thereof, may inspect the completed activity, and, from time to time, may inspect the maintenance and operation of the activity.

To compel compliance with the terms and conditions of the division's permit for any activity, the director is hereby authorized, after at least twenty days' notice, to make and enter an order revoking, suspending or modifying, in whole or in part, such permit for cause including, but not limited to, the following:

(1) Violation of any term or condition of the permit;

(2) Obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts; or

(3) Change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge, release, escape, deposit or disposition.

The director shall cause a copy of any such order to be served by registered or certified mail or by a law-enforcement officer upon the person to whom any such permit was issued. The director shall also cause a notice to be served with a copy of such order, which notice shall advise such person of the right to appeal to the board by filing a notice of appeal on the form prescribed by the board for such purpose, with the board, in accordance with the provisions of, and within the time specified in, section seven, article one, chapter twenty-two-b of this code.

WV Legislature

§22-11-13. Voluntary water quality monitors; appointment; duties; compensation.

The director is hereby authorized to appoint voluntary water quality monitors to serve at the will and pleasure of the director. All such monitors appointed pursuant hereto shall be eighteen years of age or over and shall be bona fide residents of this state.

Such monitors are authorized to take water samples of the waters of this state at such times and at such places as the director shall direct and to forward such water samples to the director for analysis.

The director is authorized to provide such monitors with such sampling materials and equipment as he or she deems necessary: Provided, That such equipment and materials shall at all times remain the property of the state and shall be immediately returned to the director upon his or her direction.

Such monitors shall not be construed to be employees of this state for any purpose except that the director is hereby authorized to pay such monitors a fee not to exceed 50¢ for each sample properly taken and forwarded to the director as hereinabove provided.

The director shall conduct schools to instruct said monitors in the methods and techniques of water sample taking and issue to said monitors an identification card or certificate showing their appointment and training.

Upon a showing that any water sample as herein provided was taken and analyzed in conformity with standard and recognized procedures, such sample and analysis is admissible in any court of this state for the purpose of enforcing the provisions of this article.

WV Legislature

§22-11-14. Information to be filed by certain persons with division; tests.

Any and all persons directly or indirectly discharging or depositing treated or untreated sewage, industrial wastes, or other wastes, or the effluent therefrom, into or near any waters of the state shall file with the director such information as the director may reasonably require on forms prescribed for such purpose, including, but not limited to, data as to the kind, characteristics, amount and rate of flow of such discharge or deposit. If the director has reasonable cause to believe that any establishment is, or may be, polluting the waters of the state, the director may require any person owning, operating or maintaining such establishment to furnish such information as may reasonably be required to ascertain whether such establishment is, or may be causing such pollution, and the director may conduct any test or tests that he or she may deem necessary or useful in making his or her investigation and determination.

WV Legislature

§22-11-15. Orders of director to stop or prevent discharges or deposits or take remedial action; service of orders.

If the director, on the basis of investigations, inspections and inquiries, determines that any person who does not have a valid permit issued pursuant to the provisions of this article is causing the pollution of any of the waters of the state, or does on occasions cause pollution or is violating any rule or effluent limitation of the board or the director, he or she shall either make and enter an order directing such person to stop such pollution or the violation of the rule or effluent limitation of the board or director, or make and enter an order directing such person to take corrective or remedial action. Such order shall contain findings of fact upon which the director based the determination to make and enter such order. Such order shall also direct such person to apply forthwith for a permit in accordance with the provisions of sections eight, nine and eleven of this article. The director shall fix a time limit for the completion of such action. Whether the director shall make and enter an order to stop such pollution or shall make and enter an order to take remedial action, in either case the person so ordered may elect to cease operations of the establishment deemed to be the source of such discharge or deposits causing pollution, if the pollution referred to in the director's order shall be stopped thereby.

The director shall cause a copy of any such order to be served by registered or certified mail or by a law-enforcement officer upon such person. The director shall also cause a notice to be served with the copy of such order, which notice shall advise such person of the right to appeal to the board by filing a notice of appeal, on the form prescribed by the board for such purpose, with the board, in accordance with the provisions of article one, chapter twenty-two-b of this code.

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§22-11-16. Compliance with orders of director.

Any person upon whom any order of the director or any order of the board in accordance with the provisions of section fifteen of this article, or article one, chapter twenty-two-b of this code has been served shall fully comply therewith.

When such person is ordered to take remedial action and does not elect to cease operation of the establishment deemed to be the source of such pollution, or when such ceasing does not stop the pollution, he or she shall forthwith apply for a permit under and in accordance with the provisions of sections eight, nine and eleven of this article. No such remedial action shall be taken until a permit therefor has been issued; however, receipt of a permit does not in and of itself constitute remedial action.

WV Legislature

§22-11-17. Power of eminent domain; procedures; legislative finding.

(a) When any person who is owner of an establishment is ordered by the director to stop or prevent pollution or the violation of the rules of the board or director or to take corrective or remedial action, compliance with which order will require the acquisition, construction or installation of a new treatment works or the extension or modification of or an addition to an existing treatment works, (which acquisition, construction, installation, extension, modification or addition of or to a treatment works pursuant to such order is referred to in this section as "such compliance") such person may exercise the power of eminent domain in the manner provided in chapter fifty-four of this code, to acquire such real property or interests in real property as may be determined by the director to be reasonably necessary for such compliance.

(b) Upon application by such person and after twenty days' written notice to all persons whose property may be affected, the director shall make and enter an order determining the specific real property or interests in real property, if any, which are reasonably necessary for such compliance. In any proceeding under this section, the person seeking to exercise the right of eminent domain herein conferred shall establish the need for the amount of land sought to be condemned and that such land is reasonably necessary for the most practical method for such compliance.

(c) The right of eminent domain herein conferred does not apply to the taking of any dwelling house or for the taking of any land within five hundred feet of any such dwelling house.

(d) The Legislature hereby declares and finds that the taking and use of real property and interests in real property determined to be reasonably necessary for such compliance promotes the health, safety and general welfare of the citizens of this state by reducing and abating pollution in the waters of this state in which the public at large has an interest and otherwise; that such taking and use are necessary to provide and protect a safe, pure and adequate water supply to the municipalities and citizens of the state; that because of topography, patterns of land development and ownership and other factors it is impossible in many cases to effect such compliance without the exercise of the power of eminent domain and that the use of real property or interests in real property to effect such compliance is a public use for which private property may be taken or destroyed.

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§22-11-18. Duty to proceed with remedial action promptly upon receipt of permit; progress reports required; finances and funds.

When any person is ordered to take remedial action and does not elect to cease operation of the establishment deemed to be the source of such pollution or when ceasing does not stop the pollution, such person shall immediately upon issuance of the permit required under section sixteen of this article take or begin appropriate steps or proceedings to carry out such remedial action. In any such case it is the duty of each individual offender, each member of a partnership, each member of the governing body of a municipal corporation and each member of the board of directors or other governing body of a private corporation, association or other legal entity whatever, to see that appropriate steps or proceedings to comply with such order are taken or begun immediately. The director may require progress reports, at such time intervals as he or she deems necessary, setting forth the steps taken, the proceedings started and the progress made toward completion of such remedial action. All such remedial action shall be diligently prosecuted to completion.

Failure of the governing body of a municipal corporation, or the board of directors or other governing body of any private corporation, association or other legal entity whatever, to provide immediately for the financing and carrying out of such remedial action, as may be necessary to comply with said order, constitutes failure to take or begin appropriate steps or proceedings to comply with such order. If such person is a municipal corporation, the cost of all such remedial action as is necessary to comply with said order shall be paid out of funds on hand available for such purpose, or out of the General Funds of such municipal corporation, not otherwise appropriated, and if there is not sufficient funds on hand or unappropriated, then the necessary funds shall be raised by the issuance of bonds. Any direct general obligation bond issue is subject to the approval of the Municipal Bond Commission and the Attorney General of the State of West Virginia.

If the estimated cost of the remedial action to be taken by a municipal corporation to comply with such order is such that any bond issue necessary to finance such action would not raise the total outstanding bonded indebtedness of such municipal corporation in excess of the Constitutional limit imposed upon such indebtedness by the Constitution of this state, then and in that event the necessary bonds may be issued as a direct obligation of such municipal corporation, and retired by a general tax levy to be levied against all property within the limit of such municipal corporation listed and assessed for taxation. If the amount of such bonds necessary to be issued would raise the total outstanding bonded indebtedness of such municipal corporation above said Constitutional limitation on such indebtedness, or if such municipal corporation by its governing body shall decide against the issuance of direct obligation bonds, then such municipal corporation shall issue revenue bonds and provide for the retirement thereof in the same manner and subject to the same conditions as provided for the issuance and retirement of bonds in article thirteen, chapter sixteen of this code: Provided, That the provisions of section six of said article, allowing objections to be filed with the governing body, and providing that a written protest of thirty percent or more of the owners of real estate requires a four-fifths vote of the governing body for the issuance of

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said revenue bonds, does not apply to bond issues proposed by any municipal corporation to comply with an order made and entered under the authority of this article, and such objections and submission of written protest is not authorized, nor does the same, if made or had, operate to justify or excuse failure to comply with such order.

The funds made available by the issuance of either direct obligation bonds or revenue bonds, as herein provided, does constitute a "sanitary fund," and shall be used for no other purpose than for carrying out such order; no public money so raised shall be expended by any municipal corporation for any purpose enumerated in this article, unless such expenditure and the amount thereof have been approved by the director. The acquisition, construction or installation, use and operation, repair, modification, alteration, extension, equipment, custody and maintenance of any disposal system by any municipal corporation, as herein provided, and the rights, powers and duties with respect thereto, of such municipal corporation and the respective officers and departments thereof, whether the same is financed by the issuance of revenue or direct obligation bonds, shall be governed by the provisions of article thirteen, chapter sixteen of this code.

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§22-11-19. Emergency orders.

Whenever the director finds that any discharge, release, escape, deposit or disposition of treated or untreated sewage, industrial wastes or other wastes into any waters within this state, when considered alone or in conjunction with other discharges, releases, escapes, deposits or dispositions, constitutes a clear, present and immediate danger to the health of the public, or to the fitness of a private or public water supply for drinking purposes, the director may, with the concurrence in writing of the commissioner of the bureau of public health, without notice or hearing, issue an order or orders requiring the immediate cessation or abatement of any such discharge, release, escape, deposit or disposition, and the cessation of any drilling, redrilling, deepening, casing, fracturing, pressuring, operating, plugging, abandoning, converting or combining of any well, or requiring such other action to be taken as the director, with the concurrence aforesaid, deems necessary to abate such danger.

Notwithstanding the provisions of any other section of this article, any order issued under the provisions of this section is effective immediately and may be served in the same manner as a notice may be served under the provisions of section two, article seven, chapter twenty-nine-a of the code. Any person to whom such order is directed shall comply therewith immediately, but on notice of appeal to the board shall be afforded a hearing as promptly as possible, and not later than ten days after the board receives such notice of appeal. On the basis of such hearing, and within five days thereafter, the board shall make and enter an order continuing the order of the director in effect, revoking it, or modifying it. For the purpose of such appeal and judicial review of the order entered following an appeal hearing, all pertinent provisions of article one, chapter twenty-two-b of this code shall govern.

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§22-11-20. Control by state as to pollution; continuing jurisdiction.

No right to violate the rules of the board or director or to continue existing pollution of any of the waters of the state exists nor may such right be acquired by virtue of past or future pollution by any person. The right and control of the state in and over the quality of all waters of the state are hereby expressly reserved and reaffirmed. It is recognized that with the passage of time, additional efforts may have to be made by all persons toward control and reduction of the pollution of the waters of the state, irrespective of the fact that such persons may have previously complied with all orders of the director or board. It is also recognized that there should be continuity and stability respecting pollution control measures taken in cooperation with, and with the approval of, the director, or pursuant to orders of the director or board. When a person is complying with the terms and conditions of a permit granted pursuant to the provisions of section eleven of this article or when a person has completed remedial action pursuant to an order of the director or board, additional efforts may be required wherever and whenever the rules of the board or director or effluent limitations are violated or the waters of the state are polluted by such person.

WV Legislature

§22-11-21. Appeal to environmental quality board.

Any person adversely affected by an order made and entered by the director in accordance with the provisions of this article, or aggrieved by failure or refusal of the chief to act within the specified time as provided in subsection (e) of section eleven of this article on an application for a permit or aggrieved by the terms and conditions of a permit granted under the provisions of this article, may appeal to the environmental quality board, pursuant to the provisions of article one, chapter twenty-two-b of this code.

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§22-11-22. Civil penalties and injunctive relief; administrative penalties.

(a) Any person who violates any provision of any permit issued under or subject to the provisions of this article, or §22-11A-1 *et seq*., or §22-11B-1 *et seq*. of this code is subject to a civil penalty not to exceed $25,000 a day of such violation and any person who violates any provision of this article, §22-11A-1 *et seq*., or §22-11B-1 *et seq*. of this code or of any rule or who violates any standard or order promulgated or made and entered under the provisions of this article, §22-11A-1 *et seq*., §22-11B-1 *et seq*. of this code or §22B-1-1 *et seq*. of this code is subject to a civil penalty not to exceed $25,000 a day of such violation. Any such civil penalty may be imposed and collected only by a civil action instituted by the director in the circuit court of the county in which the violation occurred or is occurring or of the county in which the waters thereof are polluted as the result of such violation.

Upon application by the director, the circuit courts of the state or the judges thereof in vacation may by injunction compel compliance with and enjoin violations of the provisions of this article, §22-11A-1 *et seq*., and §22-11B-1 *et seq*. of this code, the rules of the board or director, effluent limitations, the terms and conditions of any permit granted under the provisions of this article, or §22-11A-1 *et seq*., and §22-11B-1 *et seq*. of this code or any order of the director or board, and the venue of any such actions shall be the county in which the violations or noncompliance exists or is taking place or in any county in which the waters thereof are polluted as the result of such violation or noncompliance. The court or the judge thereof in vacation may issue a temporary or preliminary injunction in any case pending a decision on the merits of any injunction application filed. Any other section of this code to the contrary notwithstanding, the state is not required to furnish bond as a prerequisite to obtaining injunctive relief under this article, or §22-11A-1 *et seq*., and §22-11B-1 *et seq*. of this code. An application for an injunction under the provisions of this section may be filed and injunctive relief granted notwithstanding that all of the administrative remedies provided for in this article have not been pursued or invoked against the person or persons against whom such relief is sought and notwithstanding that the person or persons against whom such relief is sought have not been prosecuted or convicted under the provisions of this article.

The judgment of the circuit court upon any application filed or in any civil action instituted under the provisions of this section is final unless reversed, vacated, or modified on appeal to the Supreme Court of Appeals. Any such appeal shall be sought in the manner provided by law for appeals from circuit courts in other civil cases, except that the petition seeking review in any injunctive proceeding must be filed with said Supreme Court of Appeals within 90 days from the date of entry of the judgment of the circuit court.

Legal counsel and services for the chief, director, or the board in all civil penalty and injunction proceedings in the circuit court and in the Supreme Court of Appeals of this state shall be provided by the Attorney General or his or her assistants and by the prosecuting attorneys of the several counties as well, all without additional compensation, or the chief, director, or the board, with the written approval of the Attorney General, may employ counsel to represent him or her or it in a particular proceeding.

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(b) In addition to the powers and authority granted to the director by this chapter to enter into consent agreements, settlements and otherwise enforce this chapter, the director shall propose, for legislative promulgation, rules in accordance with §29A-3-1 *et seq*. of this code to establish a mechanism for the administrative resolution of violations set forth in this section through consent order or agreement as an alternative to instituting a civil action.

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§22-11-22a. Civil penalties and injunctive relief; civil administrative penalties for coal mining operations.

(a) Any person who holds a permit to operate a coal mining operation issued under article three of this chapter who violates any provision of any permit issued under or subject to the provisions of this article, or §22-11A-1 *et seq*. and §22-11B-1 *et seq*. of this code is subject to a civil penalty not to exceed $25,000 a day of the violation and any person who violates any provision of this article or of any rule or who violates any standard or order promulgated or made and entered under the provisions of this article, §22-11A-1 *et seq*. of this code or §22-11B-1 *et seq*. of this code is subject to a civil penalty not to exceed $25,000 a day of the violation: *Provided*, That any penalty imposed pursuant to the Surface Coal Mining and Reclamation Act [§22-3-1 *et seq*.] shall be credited against any enforcement action under this article for violations of standards protecting state waters.

(1) Any such civil penalty may be imposed and collected only by a civil action instituted by the secretary in the circuit court of the county in which the violation occurred or is occurring or of the county in which the waters thereof are polluted as the result of such violation.

(2) In determining the amount of a civil penalty, the circuit court shall consider the seriousness of the violation or violations, the economic benefit, if any, resulting from the violation, any history of the violations, any good-faith efforts to comply with the applicable requirements, cooperation by the permittee with the secretary, the economic impact of the penalty on the violator, and other matters as justice may require.

(3) Upon application by the secretary, the circuit courts of the state or the judges thereof in vacation may by injunction compel compliance with and enjoin violations of the provisions of this article, §22-11A-1 *et seq*., and §22-11B-1 *et seq*. of this code, the rules of the board or secretary, effluent limitations, the terms and conditions of any permit granted under the provisions of this article, §22-11A-1 *et seq*., and §22-11B-1 *et seq*. of this code or any order of the secretary or board, and the venue of any such actions shall be the county in which the violations or noncompliance exists or is taking place or in any county in which the waters thereof are polluted as the result of the violation or noncompliance. The court or the judge thereof in vacation may issue a temporary or preliminary injunction in any case pending a decision on the merits of any injunction application filed. Any other section of this code to the contrary notwithstanding, the state is not required to furnish bond as a prerequisite to obtaining injunctive relief under this article, or §22-11A-1 *et seq*., and §22-11B-1 *et seq*. of this code. An application for an injunction under the provisions of this section may be filed and injunctive relief granted notwithstanding that all of the administrative remedies provided in this article have not been pursued or invoked against the person or persons against whom such relief is sought and notwithstanding that the person or persons against whom such relief is sought have not been prosecuted or convicted under the provisions of this article.

(4) The judgment of the circuit court upon any application filed or in any civil action instituted under the provisions of this section is final unless reversed, vacated, or modified

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on appeal to the Supreme Court of Appeals. Any such appeal shall be sought in the manner provided by law for appeals from circuit courts in other civil cases, except that the petition seeking review in any injunctive proceeding must be filed with said Supreme Court of Appeals within 90 days from the date of entry of the judgment of the circuit court.

(5) Legal counsel and services for the director, secretary, or the board in all civil penalty and injunction proceedings in the circuit court and in the Supreme Court of Appeals of this state shall be provided by legal counsel employed by the department, the Attorney General or his or her assistants and by the prosecuting attorneys of the several counties as well, all without additional compensation, or the director, secretary, or the board may employ counsel to represent him or her or it in a particular proceeding.

(b) The secretary may assess a civil administrative penalty whenever he or she finds that a person who holds a permit to operate a coal mining operation issued under article three of this chapter has violated any provision of this article, or §22-11A-1 *et seq*., or §22-11B-1 *et seq*. of this code, any permit issued under or subject to the provisions of this article, or §22-11A-1 *et seq*., or §22-11B-1 *et seq*. of this code or any rule or order issued pursuant to this article, or §22-11A-1 *et seq*., or §22-11B-1 *et seq*. of this code. A civil administrative penalty may be assessed unilaterally by the director in accordance with this subsection.

(1) Any civil administrative penalty assessed pursuant to this section shall not exceed $10,000 per violation and the maximum amount of any civil administrative penalty assessed pursuant to this section may not exceed $125,000: *Provided*, That any stipulated penalties accrued after the date of the draft order may not be included for purposes of determining the total amount of the civil administrative penalty. For purposes of this section, a single operational upset which leads to simultaneous violations of more than one pollutant parameter, shall be treated as a single violation.

(2) In determining the amount of any civil administrative penalty assessed under this subsection, the secretary shall take into account the nature, circumstances, extent, and gravity of the violation or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of good faith, economic benefit or savings, if any, resulting from the violation, cooperation of the alleged violator, and such other matters as justice may require.

(3) No assessment may be levied pursuant to this subsection until after the alleged violator has been notified by certified mail or personal service pursuant to the West Virginia rules of civil procedure. The notice shall include a proposed order which refers to the provision of the statute, rule, order, or permit alleged to have been violated, a concise statement of the facts alleged to constitute the violation, a statement of the amount of the administrative penalty to be imposed, and a statement of the alleged violator's right to an informal hearing prior to the issuance of the proposed order.

(A) The alleged violator has 30 calendar days from receipt of the notice within which to deliver to the secretary a written request for an informal hearing.

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(B) If no hearing is requested, the proposed order becomes a draft order after the expiration of the 30-day period.

(C) If an informal hearing is requested, the director shall inform the alleged violator of the time and place of the hearing. The secretary may appoint an assessment officer to conduct the informal hearing and make a written recommendation to the secretary concerning the proposed order and the assessment of a civil administrative penalty.

(D) Within 30 days following the informal hearing, the secretary shall render and furnish to the alleged violator a written decision, and the reasons therefor, concerning the assessment of a civil administrative penalty. The proposed order shall be revised, if necessary, and shall become a draft order.

(4) The secretary shall provide the opportunity for the public to comment on any draft order by publishing a Class II legal advertisement in the newspaper with the largest circulation in the county in which the violation occurred, and by other such means as the secretary deems appropriate, which shall provide notice of the draft order, including the civil administrative penalty assessment. The secretary shall consider any comments received in determining whether to revise the draft order before issuance of a final order. During the 30-day public comment period, any person may request a public hearing regarding the draft order and the secretary may grant or deny the request at his or her discretion. If a request for a public hearing is denied, the secretary shall provide notice to the person requesting a hearing and reasons for such denial.

(5) Within 30 days of the close of the public comment period on a draft order, the secretary shall issue a final order or make a determination not to issue a final order, and shall provide written notice by certified mail or personal service pursuant to the West Virginia rules of civil procedure to the alleged violator and shall provide notice by certified mail or personal service pursuant to the West Virginia rules of civil procedure to those persons who submitted written comments on the draft order during the public comment period.

(6) The issuance of a final order assessing a civil administrative penalty pursuant to subsection (b) of this section may be appealed to the environmental quality board pursuant to §22-11-21 of this code. Any person who submitted written comments on a draft order during the public comment period shall have the right to file such an appeal or intervene in any appeal filed by the alleged violator.

(7) The authority to levy a civil administrative penalty is in addition to all other enforcement provisions of this article and the payment of any assessment does not affect the availability of any other enforcement provision in connection with the violation for which the assessment is levied: *Provided*, That no combination of assessments against a violator under this section shall exceed $25,000 for each violation: *Provided, however*, That any violation for which the violator has paid a civil administrative penalty assessed under this section may not be the subject of a separate civil penalty action. No assessment levied pursuant to this section becomes due and payable until at least 30 days after receipt of the final order or the

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procedures for review of the assessment, including any appeals, have been completed, whichever is later.

(c) In addition to the authorities set forth in this section, the secretary may also enter into agreements, settlements, and other consent orders resolving alleged violations of this chapter.

(d) The secretary shall propose, for legislative review, rules, including emergency rules, in accordance with the provisions of §29A-3-1 *et seq*. of this code to establish procedures for assessing civil administrative penalties in accordance with this section by no later than July 1, 2015.

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§22-11-23. Priority of actions.

All applications under section twenty-two of this article and all proceedings for judicial review under article one, chapter twenty-two-b of this code shall take priority on the docket of the circuit court in which pending, and shall take precedence over all other civil cases. Where such applications and proceedings for judicial review are pending in the same court at the same time, such applications shall take priority on the docket and shall take precedence over proceedings for judicial review.

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§22-11-24. Violations; criminal penalties.

(a) Any person who causes pollution or who fails or refuses to discharge any duty imposed upon him or her by this article, by §22-11A-1 *et seq*., or §22-11B-1 *et seq*. of this code or by any rule of the board or director, promulgated pursuant to the provisions and intent of this article, or §22-11A-1 *et seq*., or §22-11B-1 *et seq*. of this code, or by an order of the director or board, or who fails or refuses to apply for and obtain a permit as required by the provisions of this article, or §22-11A-1 *et seq*., or §22-11B-1 *et seq*. of this code, or who fails or refuses to comply with any term or condition of such permit, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than $100 nor more than $1,000, or confined in jail for a period not exceeding six months, or by both fine and confinement.

(b) Any person who intentionally misrepresents any material fact in an application, record, report, plan, or other document filed or required to be maintained under the provisions of this article, §22-11A-1 *et seq*., or §22-11B-1 *et seq*. of this code or any rules promulgated by the director thereunder is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than $1,000 nor more than $10,000 or confined in jail not exceeding six months, or by both fine and confinement.

(c) Any person who willfully or negligently violates any provision of any permit issued under or subject to the provisions of this article, or §22-11A-1 *et seq*., or §22-11B-1 *et seq*. of this code or who willfully or negligently violates any provision of this article, or §22-11A-1 *et seq*., or §22-11B-1 *et seq*. of this code, any rule of the board or director, any effluent limitation, or any order of the director or board is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation or by confinement in jail not exceeding one year or by both fine and confinement.

(d) Any person convicted of a second or subsequent willful violation of subsections (b) or (c) of this section or knowingly and willfully violates any provision of any permit, rule, or order issued under or subject to the provisions of this article, or §22-11A-1 *et seq*., or §22-11B-1 *et seq*. of this code, or knowingly and willfully violates any provision of this article, or §22-11A-1 *et seq*., or §22-11B-1 *et seq*. of this code, is guilty of a felony and, upon conviction, shall be imprisoned in a state correctional facility not less than one nor more than three years, or fined not more than $50,000 for each day of violation, or both fined and imprisoned.

(e) Any person may be prosecuted and convicted under the provisions of this section notwithstanding that none of the administrative remedies provided in this article have been pursued or invoked against said person and notwithstanding that civil action for the imposition and collection of a civil penalty or an application for an injunction under the provisions of this article has not been filed against such person.

(f) Where a person holding a permit is carrying out a program of pollution abatement or remedial action in compliance with the conditions and terms of the permit, the person is not

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subject to criminal prosecution for pollution recognized and authorized by the permit.

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§22-11-25. Civil liability; Natural Resources Game Fish and Aquatic Life Fund; use of funds.

If any loss of game fish or aquatic life results from a person or persons' failure or refusal to discharge any duty imposed upon such person by this article, section seven, article six of this chapter, or §22-11A-1 *et seq.*, or §22-11B-1 *et seq.* of this code, either the West Virginia Division of Natural Resources or the Division of Environmental Protection, or both jointly may initiate a civil action on behalf of the State of West Virginia to recover from such person or persons causing such loss a sum equal to the cost of replacing such game fish or aquatic life. Any moneys so collected shall be deposited in a special revenue fund entitled "Natural Resources Game Fish and Aquatic Life Fund" and shall be expended as hereinafter provided. The fund shall be expended to stock waters of this state with game fish and aquatic life. Where feasible, the Director of the Division of Natural Resources shall use any sum collected in accordance with the provisions of this section to stock waters in the area in which the loss resulting in the collection of such sum occurred. Any balance of such sum shall remain in said fund and be expended to stock state-owned and -operated fishing lakes and ponds, wherever located in this state, with game fish and aquatic life.

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§22-11-26. Exceptions as to criminal liabilities.

The criminal liabilities may not be imposed pursuant to section twenty-four of this article for violations resulting from accident or caused by an act of God, war, strike, riot or other catastrophe as to which negligence or willful misconduct on the part of such person was not the proximate cause.

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§22-11-27. Existing rights and remedies preserved; article for benefit of state only.

It is the purpose of this article to provide additional and cumulative remedies to abate the pollution of the waters of the state and nothing herein contained shall abridge or alter rights of action or remedies now or hereafter existing, nor shall any provisions in this article, or any act done by virtue of this article, be construed as estopping the state, municipalities, public health officers, or persons as riparian owners or otherwise, in the exercise of their rights to suppress nuisances or to abate any pollution now or hereafter existing, or to recover damages.

The provisions of this article inure solely to and are for the benefit of the people generally of the State of West Virginia, and this article is not intended to in any way create new, or enlarge existing rights of riparian owners or others. An order of the director or of the board, the effect of which is to find that pollution exists, or that any person is causing pollution, or any other order, or any violation of any of the provisions of this article shall give rise to no presumptions of law or findings of fact inuring to or for the benefit of persons other than the State of West Virginia.

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§22-11-28. Functions, services and reports of director of the division; obtaining information from others.

The director shall make surveys and investigations of the water resources of the state and shall maintain an inventory of the water resources of the state and to the extent practicable shall divide the state into watershed drainage areas in making this inventory. The director shall investigate and study the problems of agriculture, industry, conservation, health, water pollution, domestic and commercial uses and allied matters as they relate to the water resources of the state, and shall make and formulate comprehensive plans and recommendations for the further development, improvement, protection, preservation, regulation and use of such water resources, giving proper consideration to the hydrologic cycle in which water moves. The director shall provide to the Legislature a biennial report on the quality of the state's waters, including an evaluation of the information which has been obtained in accordance with the requirements of this section and shall include in this report the plans and recommendations which have been formulated pursuant to the requirements of this section. Where possible the timing and content of this report shall be structured so that it may also be used to fulfill any federal program reporting requirements. The report shall include reasons for such plans and recommendations, as well as any changes in the law which are deemed desirable to effectuate such plans and recommendations. Such report shall be made available to the public at a reasonable price to be determined by the director.

The director may request, and, upon request, is entitled to receive from any agency of the state or any political subdivision thereof, or from any other person who engages in a commercial use or controls any of the water resources of the state, such necessary information and data as will assist in obtaining a complete picture of the water resources of the state and the existing control and commercial use thereof. The director shall reimburse such agencies, political subdivisions and other persons for any expenses, which would not otherwise have been incurred, in making such information and data available.

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§22-11-29. Reimbursement of response costs.

(a) The secretary may recover through civil action or cooperative agreements with responsible persons, the actual, reasonable and necessary amounts expended by the department for the purpose of responding to, evaluating or overseeing a response to a spill or accidental discharge of any pollutant that enters the waters of the state, or taking measures required to prevent a spill or accidental discharge of any pollutant from entering the waters of the state. The department shall provide the responsible party an itemized invoice of the expenditures that the department seeks to recover.

(b) All moneys recovered by the secretary shall be deposited into the water quality management fund created in section ten of this article and shall be used for future responses to, evaluation or oversight of a response to a spill or accidental discharge of any pollutant that enters the waters of the state, or measures required to be taken to prevent a spill or accidental discharge of any pollutant from entering the waters of the state.

(c) The amounts that may be collected by the secretary pursuant to subsection (a) of this section may include any reasonable and necessary costs incurred by a third party who is not a responsible party and who, with the prior authorization of the secretary or the chief inspector, responds to a spill or accidental discharge that enters or threatens to enter the waters of the state. The department is not responsible for or may not be held liable for costs incurred by the third party responder.

(d) Any civil action instituted pursuant to this section may be brought in the county in which the spill or accidental discharge occurred or the county in which the response occurred.

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§22-11-30. Chesapeake Bay Restoration Initiative.

(a) The Legislature finds and declares that:

(1) The Chesapeake Bay and its tributaries are valuable natural resources providing both recreational and economic opportunities to citizens living in and around the Chesapeake Bay watershed. Eight West Virginia counties, and a collective population of more than two hundred thousand citizens, are within the Chesapeake Bay watershed. The protection and promotion of the environmental health and integrity of the Chesapeake Bay is accordingly in the best interests of the State of West Virginia.

(2) The Chesapeake Bay has been identified by the United States Environmental Protection Agency as an impaired water due to excess nitrogen and phosphorous entering the bay from its various tributaries. These pollutants, commonly referred to as nutrients, result in depleted dissolved oxygen supplies and other factors which impact the overall health of the Chesapeake Bay and its watershed.

(b) West Virginia is among six states from which nutrients flow into the Chesapeake Bay. In order to restore the Chesapeake Bay, these states have agreed to reduce the amount of nutrients contributed to the Chesapeake Bay by sources located within their respective jurisdictions.

(c) Among the sources of nutrients discharged into the Chesapeake Bay watershed are wastewater discharged by West Virginia wastewater treatment facilities, stormwater discharged from various sources, wastewater discharged from agriculture-related activities and other sources of wastewater related to both natural and man-made impacts which are not specifically set forth herein.

(d) The need to provide and maintain affordable and high-quality public infrastructure services and to safeguard existing industrial and agricultural sectors of the economy in the Chesapeake Bay watershed are essential to the continued economic growth and quality of life of West Virginia communities within the watershed. Protection of these communities' economic vitality and the Chesapeake Bay are critical interests of the state. The capital costs of nutrient removal processes, if borne by individual rate customers of sewer services or by individual business owners, would result in significant increases in rates for an essential public service, deferral or cancellation of other critical infrastructure extensions and/or improvements and act as a disincentive for business growth, both commercial and agricultural, in these communities, if not the shrinking of industrial and agricultural activity in the watershed. Therefore, a holistic program, while assuring the protection of the Chesapeake Bay, must include: (1) A nutrient trading and off-set program to allow for efficiencies within the watershed to assure that public moneys are placed to best use; and (2) a capital improvement program to assist those required to install capital improvements to obtain the reductions in nutrients previously agreed to by the state.

(e) The secretary, in consultation with affected stakeholders, is hereby directed to establish

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no later than June 1, 2011, a program of nutrient trading and off-sets. Pending establishment of such a program, the secretary is authorized to consider and implement interim trading and offset programs as necessary and appropriate for individual permittees in order to protect the Chesapeake Bay and its tributaries.

(f) The secretary is hereby directed, no later than June 1, 2010, and in consultation with affected stakeholders, to report to the Joint Legislative Commission on State Water Resources the status of proposed performance standards necessary for wastewater treatment facilities in the Chesapeake Bay watershed for any reduction of nutrients in the watershed required to protect water quality in the Bay.

(g) The secretary and stakeholders shall, no later than June 1, 2010, consider and recommend to the Legislature a program establishing a new and independent source of funding for capital improvements for public facilities made necessary by the imposition of nutrient removal requirements.

(h) Should it be determined based upon new information or the issuance of a final total maximum daily load for the Chesapeake Bay that modifications to nutrient loading requirements contained in West Virginia/National Pollutant Discharge Elimination System permits are necessary to be consistent with this new information or the final total maximum daily load, the secretary shall recalculate such loading requirements and modify such permits consistent with this information.

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§22-11-31. State pre-emption in favor of commercial horticulture under the Water Pollution Control Act.

(a) Notwithstanding the provisions of Chapter 7, Chapter 7A, Chapter 8, and Chapter 8A of the West Virginia Code or the West Virginia Code of State Rules promulgated thereunder to the contrary, no county, municipality, or political subdivision may prohibit, regulate, permit, or license commercial horticulture by adopting any charter, law, rule, regulation, ordinance, or zoning provision concerning the size, placement, location, or operation of commercial horticulture within the subject matter of the Water Pollution Control Act, as provided in §22-11-1 *et seq*. of this code, and all such provisions in charters, laws, rules, regulations, ordinances, or zoning provisions are hereby invalid and unenforceable.

(b) No county, municipality, or political subdivision may bring a cause of action against a commercial horticulture operation for any activity within the subject matter of said Water Pollution Control Act, if the commercial horticulture operation is in material compliance of the Water Pollution Control Act, its rules, and federal laws and regulations.

(c) Any political subdivision of this state may not enact an ordinance within the subject matter of said Water Pollution Control Act that is more stringent than any federal or state rule, regulation, program, or permitting regime.

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