WEST VIRGINIA CODE CHAPTER 22 ARTICLE 13

WV Legislature

§22-13-1. Short title.

This article may be known and cited as the Natural Streams Preservation Act.

WV Legislature

§22-13-2. Declaration of public policy.

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not impound, flood or divert all streams within the State of West Virginia, leaving no streams designated for preservation and protection in their natural condition, it is hereby declared to be the public policy of this state to secure for the citizens of West Virginia of present and future generations the benefits of an enduring resource of free-flowing streams possessing outstanding scenic, recreational, geological, fish and wildlife, botanical, historical, archeological or other scientific or cultural values.

WV Legislature

§22-13-3. Definitions.

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

(1) "Board" means the environmental quality board;

(2) "Director" means the director of the Division of Environmental Protection or such other person to whom the director has delegated authority or duties pursuant to sections six or eight, article one of this chapter;

(3) "Free-flowing" means existing or flowing in natural condition without impoundment, by diversion, or flooding of the waterway;

(4) "Modification" means the impounding, diverting or flooding of a stream within the natural stream preservation system;

(5) "Modify" means to impound, divert or flood a stream within the natural stream preservation system;

(6) "Permit" means a permit required by section seven of this article;

(7) "Person," "persons" or "applicants" means any 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 agencies; political subdivision; county commission; municipal corporations; industries; 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 other legal entity whatever;

(8) "Protected stream" means any stream designated as such in section five of this article, but does not include tributaries or branches unless specifically designated or described in section five of this article;

(9) "Stream" means a flowing body of water or a section or portion thereof, including rivers, streams, creeks, branches or small lakes.

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§22-13-4. Establishment of natural stream preservation system.

For the purpose of implementing the public policy declared in section two of this article, there is hereby established a natural stream preservation system to be composed of streams designated by the Legislature as "protected streams," and these shall be administered for the use and enjoyment of the citizens of West Virginia in such manner as will leave them unimpaired for future use and enjoyment as free-flowing streams, and so as to provide for the protection and the preservation of these streams in their natural character.

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§22-13-5. Designation of protected streams.

The following streams are hereby designated as protected streams within the natural streams preservation system, namely:

(a) Greenbrier River from its confluence with Knapps Creek to its confluence with the New River.

(b) Anthony Creek from its headwaters to its confluence with the Greenbrier River.

(c) Cranberry River from its headwaters to its confluence with the Gauley River.

(d) Birch River from the Cora Brown bridge in Nicholas county to the confluence of the river with the Elk River.

(e) New River from its confluence with the Gauley River to its confluence with the Greenbrier River.

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§22-13-6. General powers and duties of director with respect to protected streams.

(a) In addition to all other powers and duties of the director, as prescribed in this article or elsewhere by law, the director shall exercise supervision over the administration and enforcement of the provisions of this article, and all orders and permits issued pursuant to the provisions of this article.

(b) In addition to all other powers and duties of the director, as prescribed in this article or elsewhere by law, the director has authority to promulgate rules, in accordance with the provisions of chapter twenty-nine-a of this code, to implement and make effective the powers, duties and responsibilities vested in the director by the provisions of this article and otherwise by law: Provided, That all such rules shall be consistent with the declaration of public policy set forth in section two of this article.

(c) The director and duly authorized representatives, have the power and authority to make investigations, inspections and inquiries concerning compliance with the provisions of this article, any order made and entered in accordance with the provisions of this article, any rules promulgated by the director, and with the terms and conditions of any permit issued in accordance with the provisions of section nine of this article. In order to make such investigations, inspections and inquiries, the director and duly authorized representatives, have the power and authority to enter at all reasonable times upon any private or public property, subject to responsibility for any damage to the property entered. Upon entering, and before making any investigation, inspection and inquiry, 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 a subdivision, and before making any investigation, inspection and inquiry, 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 a refusal of the person owning or controlling such property to permit such entrance or the making of such inspections, investigations and inquiries, 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 and the making of such inspections, investigations, and inquiries; 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. Nothing contained in this section eliminates any obligation to follow any process that may be required by law.

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§22-13-7. When permits required; when permits not to be issued.

(a) It is unlawful for any person, until the department's permit has been granted, to modify any protected stream or any part of the stream. A permit may not be issued unless the work proposed to be done under the permit:

(1) Will not materially alter or affect the free-flowing characteristics of a substantial part of a protected stream or streams;

(2) Is necessary to prevent an undue hardship; and

(3) Meets with the approval of the secretary.

(b) The Department of Transportation's Division of Highways is not required to obtain a permit under this section when it is repairing or replacing damaged bridges and that repair or replacement requires the construction of temporary flow diversions in the stream that will not permanently materially alter or affect the free-flowing characteristics of a substantial part of the steam, so long as boat passage remains available during the entire period of bridge repair or replacement.

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§22-13-8. Application for permit; form of application; information required; fees.

The director shall prescribe a form of application for all permits. All applications for permits shall be submitted to the division and shall be on the prescribed form.

A permit fee of $10 shall accompany the application when filed with the division. The permit fee shall be deposited in the state Treasury to the credit of the state general fund.

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§22-13-9. Procedure for issuance or denial of permit; transfer of permits.

(a) Before issuing a permit, a public hearing shall be held. The director shall consider the application and shall fix a time and place for hearing on such application. The hearing shall be held in a county in which the proposed modification is to be made and, if the proposed modification is to be made in more than one county, then a separate hearing shall be held in each county in which the proposed modification is to be made. The applicant shall cause a notice of the time and place of such hearing and the purpose thereof to be published as a Class III-0 legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication is the county or counties in which the proposed modification is to be made. Publication of the notice shall be completed at least fifteen days before such hearing. The applicant shall also cause to be served, at least fifteen days before such hearings, in the manner provided by law for the service of notice and process, a notice showing the time, place and purpose of such hearing, upon every owner of property, and every person holding a lien thereon, abutting on that portion of the stream on which the modification is to be made, or abutting on any portion of such stream within two miles above or below the proposed modification. The affidavit of publication of such notice shall be filed with the director or his or her duly designated hearing examiner at or before the hearing as a part of the record in the proceedings.

(b) At the time and place fixed for the hearings, the director or his or her duly designated hearing examiner shall hear any evidence relating to the proposed modification, the necessity therefor, the effect of such modification on the stream and any and all other matters relevant to the application and the proposed modification. If the director concludes and finds upon the record and evidence in the proceedings that the proposed modification should be permitted, he or she shall proceed to issue the permit: Provided, That the director may attach such conditions, qualifications or limitations to such permit as he or she finds appropriate.

(c) An application for any such permit shall be acted upon by the director and the division's permit delivered or mailed, or a copy of any order of the director denying any such application mailed as hereinafter specified, as the case may be, to the applicant by the director within forty-five days after the hearings have been completed.

(d) When it is established that an application for a permit should be denied, the director 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 director shall also cause a notice to be served with the copy of such order, which notice shall advise the applicant of his or her right to appeal to the board by filing a notice of appeal, on a form prescribed by the board for such purpose, with the board, within the time specified in and in accordance with the provisions of section seven, article one, chapter twenty-two-b of this code. However, an applicant may offer the plans and specifications for the proposed modification and submit a new application for any such permit, in which event the procedure hereinbefore outlined with respect to an original application shall apply.

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(e) Upon the sale of property which includes an activity for which the division's permit was granted, the permit is transferable to the new owner, but the transfer does not become effective until it is made in the records of the division.

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§22-13-10. Inspections; orders to compel compliance with permits; service of order.

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

To compel compliance with the terms and conditions of the division's permit for any such modification and with the plans and specifications therefor and the plan of maintenance and method of operation thereof, the director is hereby authorized after reasonable notice to make and enter an order revoking or suspending such permit and directing the person to whom such permit was issued to stop or suspend any and all work on such activity or, to take affirmative action to correct the deficiencies specified in such order so there will be full compliance with the terms and conditions of such permit and with the plans and specifications therefor, and the plan of maintenance and method of operation thereof.

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 the copy of such order, which notice shall advise such person of his or her 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, within the time specified in and in accordance with the provisions of section seven, article one, chapter twenty-two-b of this code.

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§22-13-11. Appeal to environmental quality board.

(a) 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 director to act within the time required by section nine 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 for an order vacating or modifying such order, or for such order, action or terms and conditions as the director should have entered, taken or imposed.

(b) Notwithstanding the provisions of section nine, article one, chapter twenty-two-b of this code:

(1) Appeals from orders of the board in cases involving an order denying an application for a permit, or approving or modifying the terms and conditions of a permit, shall be filed, within the time specified in said section, in the circuit court of any county in which such modification is proposed to be made.

(2) Appeals from orders of the board in cases involving an order revoking or suspending a permit and directing any and all work on such modification to stop, or directing that affirmative action be taken to correct alleged and specified deficiencies concerning any such modification, shall be filed, within the time specified in said section, in the circuit court of any county in which any part of such modification is proposed to be made.

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§22-13-12. Actions to abate nuisances; injunctive relief.

Whether any violation of the provisions of this article or any final order of the director or the board results in prosecution or conviction or not, any such violation is a nuisance which may be abated upon application by the chief to the circuit court of the county in which such nuisance or any part thereof exists, or to the judge thereof in vacation. Upon application by the director, the circuit courts of this state may by mandatory or prohibitive injunction compel compliance with all final orders of the director or board. Any application for an injunction to compel compliance with any final order of the director or board shall be made to the circuit court of any county in which the modification to which the order relates is proposed to be made, or in which the modification to which the order relates is situate or would be situate upon completion thereof. Upon application by the director to the circuit court of the county in which a municipal corporation is located, or in which any person resides or does business, or to the judge thereof in vacation, such court may by injunction require the performance of any duty imposed upon such municipal corporation or person by the provisions of this article. The court may issue a temporary injunction in any case pending a decision on the merits of any application filed. In cases of modifications where irreparable damage will result from any delay incident to the administrative procedures set forth in this article, the director may forthwith apply to the circuit court of any county in which the modification is taking place for a temporary injunction. Such court may issue a temporary injunction pending final disposition of the case by the director or the board, in the event an appeal is taken to the board.

The judgment of the circuit court upon any application permitted by 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 a manner provided by law for appeals for circuit courts in other civil cases, except that the petition seeking such review must be filed with said Supreme Court of Appeals within ninety days from the date of entry of the judgment of the circuit court.

The director shall be represented in all such proceedings by the Attorney General or his or her assistant and in such proceedings in the circuit court by the prosecuting attorneys of the several counties as well, all without additional compensation.

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§22-13-13. Priority of actions.

All applications under section twelve 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 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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§22-13-14. Violations; criminal penalties.

Any person who fails or refuses to discharge any duty imposed upon him or her by this article or by any final 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, is guilty of a misdemeanor, and, upon conviction thereof, shall be punished for a first offense by a fine of not less than $25 nor more than $100, and for a second offense by a fine of not less than $200 nor more than $500, and for a third offense and each subsequent offense by a fine of not less than $500 nor more than $1,000 or by imprisonment for a period not to exceed six months, or in the discretion of the court by both such fine and imprisonment.

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§22-13-15. Exceptions as to criminal liabilities.

The criminal liabilities provided for in section fourteen of this article may not be imposed for any violation resulting from accident or caused by an act of God, war, strike, riot or other catastrophe as to which negligence or willful conduct on the part of such person was not the proximate cause.

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