

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1969

ENROLLED

SENATE BILL NO. 149

(By Mr. Bowling)

PASSED March 8 1969

In Effect from Passage



FILED IN THE OFFICE
JOHN D. ROCKEFELLER, II
SECRETARY OF STATE
THIS DATE 3-17-69

#149

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Senate Bill No. 149

(By MR. BOWLING)

[Passed March 8, 1969; in effect from passage.]

AN ACT to amend chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article five-b, relating to the establishment of a natural streams preservation system composed of protected streams designated for inclusion therein by the Legislature, providing for the regulation and control thereof and providing criminal offenses and penalties.

Be it enacted by the Legislature of West Virginia:

That chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article five-b, to read as follows:

ARTICLE 5B. NATURAL STREAMS PRESERVATION ACT.

§20-5B-1. Declaration of public policy.

1 In order to assure that an increasing population, accom-
2 panied by expanding settlement and growing mechaniza-
3 tion, does not impound, flood or divert all streams within
4 the state of West Virginia, leaving no streams designated
5 for preservation and protection in their natural condition,
6 it is hereby declared to be the public policy of this state
7 to secure for the citizens of West Virginia of present and
8 future generations the benefits of an enduring resource
9 of free-flowing streams possessing outstanding scenic,
10 recreational, geological, fish and wildlife, botanical, his-
11 torical, archeological, or other scientific or cultural values.

§20-5B-2. Definitions.

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

3 (a) "Board" shall mean the state water resources
4 board;

5 (b) "Chief" shall mean the chief of the division of water
6 resources of the department of natural resources;

7 (c) "Director" shall mean the director of the depart-
8 ment of natural resources;

9 (d) "Free-flowing" shall mean existing or flowing in
10 natural condition without impoundment, by diversion,
11 or flooding of the waterway;

12 (e) "Modification" shall mean the impounding, divert-
13 ing or flooding of a stream within the natural stream
14 preservation system;

15 (f) "Modify" shall mean to impound, divert or flood
16 a stream within the natural stream preservation system;

17 (g) "Permit" shall mean a permit required by section
18 six of this article;

19 (h) "Person", "persons" or "applicants" shall mean
20 any public or private corporation, institution, association,
21 firm or company organized or existing under the laws of
22 this or any other state or country; state of West Vir-
23 ginia; governmental agencies; political subdivision; coun-
24 ty court; municipal corporations; industries; sanitary
25 district; public service district; drainage district; soil
26 conservation district; watershed improvement district;
27 partnership; trust; estate; person or individual; group of

28 persons or individuals acting individually or as a group;
29 or any other legal entity whatever;

30 (i) "Protected stream" shall mean any stream desig-
31 nated as such in section four of this article, but shall not
32 include tributaries or branches unless specifically desig-
33 nated or described in section four of this article.

34 (j) "Stream" shall mean a flowing body of water or a
35 section or portion thereof, including rivers, streams,
36 creeks, branches or small lakes.

**§20-5B-3. Establishment of natural stream preservation sys-
tem.**

1 For the purpose of implementing the public policy de-
2 clared in section one of this article, there is hereby estab-
3 lished a natural stream preservation system to be com-
4 posed of streams designated by the Legislature as "pro-
5 tected streams", and these shall be administered for the
6 use and enjoyment of the citizens of West Virginia in
7 such manner as will leave them unimpaired for future
8 use and enjoyment as free-flowing streams, and so as to
9 provide for the protection and the preservation of these
10 streams in their natural character.

§20-5B-4. Designation of protected streams.

1 The following streams are hereby designated as pro-
2 tected streams within the natural streams preservation
3 system, namely:

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

6 (b) Anthony Creek from its head waters to its con-
7 fluence with the Greenbrier River.

8 (c) Cranberry River from its headwaters to its con-
9 fluence with Gauley River.

**§20-5B-5. General powers and duties of chief of division of
water resources and water resources board with
respect to protected streams.**

1 (a) In addition to all other powers and duties of the
2 chief of the department's division of water resources, as
3 prescribed in this article or elsewhere by law, the chief,
4 under the supervision of the director, shall exercise gen-
5 eral supervision over the administration and enforcement
6 of the provisions of this article, and all orders and permits
7 issued pursuant to the provision of this article.

8 (b) In addition to all other powers and duties of the
9 water resources board, as prescribed in this article or
10 elsewhere by law, the board shall have authority to
11 promulgate rules and regulations, in accordance with
12 the provisions of chapter twenty-nine-a of this code, to
13 implement and make effective the powers, duties and
14 responsibilities vested in the board and the chief by the
15 provisions of this article and otherwise by law: *Provided,*
16 That all such rules and regulations shall be consistent
17 with the declaration of public policy set forth in section
18 one of this article.

19 (c) The board is hereby authorized to hire one or more
20 individuals to serve as hearing examiners on a full or
21 part-time basis. Such individuals may be attorneys at law
22 admitted to practice before any circuit court of this state.
23 All such hearing examiners shall be individuals author-
24 ized to take depositions under the laws of this state.

25 (d) The board, any member thereof and the chief, and
26 their duly authorized representatives, shall have the
27 power and authority to make investigations, inspections
28 and inquiries concerning compliance with the provisions

29 of this article, any order made and entered in accordance
30 with the provisions of this article, any rules or regula-
31 tions promulgated by the board, and with the terms and
32 conditions of any permit issued in accordance with the
33 provisions of section eight of this article. In order to
34 make such investigations, inspections and inquiries, the
35 board, any member thereof and the chief, and their duly
36 authorized representatives, shall have the power and
37 authority to enter at all reasonable times upon any
38 private or public property, subject to responsibility for
39 any damage to the property entered. Upon entering, and
40 before making any investigation, inspection and inquiry,
41 such person shall immediately present himself to the
42 occupant of the property. Upon entering property used
43 in any manufacturing, mining or other commercial enter-
44 prise, or by any municipality or governmental agency
45 or a subdivision, and before making any investigation,
46 inspection and inquiry, such person shall immediately
47 present himself to the person in charge of the operation,
48 and if he is not available, to a managerial employee. All
49 persons shall cooperate fully with the person entering

50 such property for such purposes. Upon a refusal of the
51 person owning or controlling such property to permit
52 such entrance or the making of such inspections, investi-
53 gations and inquiries, the board or the chief may apply
54 to the circuit court of the county in which such property
55 is located, or to the judge thereof in vacation, for an order
56 permitting such entrance and the making of such inspec-
57 tions, investigations, and inquiries; and jurisdiction is
58 hereby conferred upon such court to enter such order
59 upon a showing that the relief asked is necessary for the
60 proper enforcement of this article: *Provided, however,*
61 That a dwelling occupied for residential purposes shall
62 not be entered without a search warrant.

**§20-5B-6. When permits required; when permits not to be
issued.**

1 It shall be unlawful for any person, until the depart-
2 ment's permit therefor has been granted, to modify any
3 protected stream or any part thereof. No permit shall be
4 issued unless the work proposed to be done under such
5 permit: (a) Will not materially alter or affect the free-
6 flowing characteristics of a substantial part of a protected

7 stream or streams; (b) is necessary to prevent an undue
8 hardship; and (c) meets with the approval of the chief.

**§20-5B-7. Application for permit; form of application; in-
formation required; fees.**

1 The chief shall prescribe a form of application for all
2 permits. All applications for permits shall be submitted
3 to the division of water resources and shall be on the
4 prescribed form.

5 A permit fee of ten dollars shall accompany the ap-
6 plication when filed with the division of water resources.

7 The permit fee shall be deposited in the state treasury
8 to the credit of the state general fund.

**§20-5B-8. Procedure concerning permits required by section
six; transfer of permits.**

1 (a) Before issuing a permit, a public hearing shall
2 be held. The chief shall consider the application and
3 shall fix a time and place for hearing on such applica-
4 tion. The hearing shall be held in a county in which
5 the proposed modification is to be made and, if the
6 proposed modification is to be made in more than one
7 county, then a separate hearing shall be held in each

8 county in which the proposed modification is to be made.
9 The applicant shall cause a notice of the time and place
10 of such hearing and the purpose thereof to be pub-
11 lished as a Class III-0 legal advertisement in compliance
12 with the provisions of article three, chapter fifty-nine
13 of this code, and the publication area for such publication
14 shall be the county or counties in which the proposed
15 modification is to be made. Publication of the notice
16 shall be completed at least fifteen days before such
17 hearing. The applicant shall also cause to be served,
18 at least fifteen days before such hearings, in the manner
19 provided by law for the service of notice and process,
20 a notice showing the time, place and purpose of such
21 hearing, upon every owner of property, and every per-
22 son holding a lien thereon, abutting on that portion of
23 the stream on which the modification is to be made,
24 or abutting on any portion of such stream within two
25 miles above or below the proposed modification. The
26 affidavit of publication of such notice shall be filed
27 with the chief or his duly designated hearing examiner
28 at or before the hearing as a part of the record in the
29 proceedings.

30 (b) At the time and place fixed for the hearings, the
31 chief or his duly designated hearing examiner shall hear
32 any evidence relating to the proposed modification, the
33 necessity therefor, the effect of such modification on the
34 stream and any and all other matters relevant to the
35 application and the proposed modification. If the chief
36 concludes and finds upon the record and evidence in
37 the proceedings that the proposed modification should
38 be permitted, he shall proceed to issue the permit: *Pro-*
39 *vided, however,* That the director may attach such con-
40 ditions, qualifications or limitations to such permit as
41 he finds appropriate.

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

48 (d) When it is established that an application for
49 a permit should be denied, the chief shall make and
50 enter an order to that effect, which order shall specify

51 the reasons for such denial, and shall cause a copy of
52 such order to be served on the applicant by registered
53 or certified mail. The chief shall also cause a notice
54 to be served with the copy of such order, which notice
55 shall advise the applicant of his right to appeal to the
56 board by filing a notice of appeal, on a form prescribed
57 by the board for such purpose, with the board, in
58 accordance with the provisions of section ten of this
59 article, within thirty days after the date upon which
60 the applicant received the copy of such order. However,
61 an applicant may offer the plans and specifications for
62 the proposed modification and submit a new application
63 for any such permit, in which event the procedure herein-
64 before outlined with respect to an original application
65 shall apply.

66 (e) Upon the sale of property which includes an
67 activity for which the department's permit was granted,
68 the permit shall be transferable to the new owner, but
69 the transfer shall not become effective until it is made
70 in the records of the division of water resources.

§20-5B-9. Inspections; orders to compel compliance with permits; service of order.

1 After issuance of the department's permit for any such
2 modification, the chief and his duly authorized representa-
3 tives may make field inspections of the work on the
4 modification, and, after completion thereof, may inspect
5 the completed modification, and, from time to time, may
6 inspect the maintenance and operation of such modifica-
7 tion.

8 To compel compliance with the terms and conditions
9 of the department's permit for any such modification and
10 with the plans and specifications therefor and the plan of
11 maintenance and method of operation thereof, the chief
12 is hereby authorized after reasonable notice to make and
13 enter an order revoking or suspending such permit and
14 directing the person to whom such permit was issued to
15 stop or suspend any and all work on such activity or, to
16 take affirmative action to correct the deficiencies specified
17 in such order so there will be full compliance with the
18 terms and conditions of such permit and with the plans

19 and specifications therefor, and the plan of maintenance
20 and method of operation thereof.

21 The chief shall cause a copy of any such order to be
22 served by registered or certified mail or by a conserva-
23 tion officer or other law enforcement officer upon the
24 person to whom any such permit was issued. The chief
25 shall also cause a notice to be served with the copy of
26 such order, which notice shall advise such person of his
27 right to appeal to the board by filing a notice of appeal
28 on the form prescribed by the board for such purpose,
29 with the board, in accordance with the provisions of sec-
30 tion ten of this article, within thirty days after the date
31 upon which such person received the copy of such order.

§20-5B-10. Appeal to water resources board.

1 (a) Any person adversely affected by an order made
2 and entered by the chief in accordance with the pro-
3 visions of this article, or aggrieved by failure or refusal
4 of the chief to act within the time required by section
5 eight of this article on an application for a permit or
6 aggrieved by the terms and conditions of a permit granted
7 under the provisions of this article, may appeal to the

8 water resources board for an order vacating or modifying
9 such order, or for such order, action or terms and condi-
10 tions as the chief should have entered, taken or imposed.
11 The person so appealing shall be known as the appellant
12 and the chief shall be known as the appellee.

13 (b) Such appeal shall be perfected by filing a notice
14 of appeal, on the form prescribed by the board for such
15 purpose, with the board within thirty days after the date
16 upon which the appellant received the copy of such
17 order, or received such permit, as the case may be. The
18 filing of the notice of appeal shall stay or suspend execu-
19 tion of any order appealed from. The notice of appeal
20 shall set forth the order or terms and conditions com-
21 plained of and the grounds upon which the appeal is
22 based. A copy of the notice of appeal shall be filed by the
23 board with the chief within three days after the notice of
24 appeal is filed with the board.

25 (c) Within seven days after receipt of his copy of the
26 notice of appeal, the chief shall prepare and certify to the
27 board a complete record of the proceedings out of which
28 the appeal arises, including all documents and corre-

29 spondence in the chief's file relating to the matter in
30 question. With the consent of the board and upon such
31 terms and conditions as the board may prescribe, any
32 persons affected by any such modification may by petition
33 intervene as a part appellant or appellee. The board shall
34 hear the appeal de novo, and evidence may be offered on
35 behalf of the appellant and appellee, and, with the consent
36 of the board, by any intervenors. No such hearing shall
37 be heard on such appeal until ten days following service
38 of notice of such appeal on all persons shown by the
39 record to be interested in the matter.

40 (d) All of the pertinent provisions of article five, chap-
41 ter twenty-nine-a of this code shall apply to and govern
42 the hearing on appeal authorized by this section and the
43 administrative procedures in connection with and follow-
44 ing such hearing, with like effect as if the provisions of
45 said article five were set forth in extenso in this section,
46 with the following modifications or exceptions:

47 (1) Unless the board directs otherwise, the appeal
48 hearing shall be held in the city of Charleston, Kanawha
49 county, West Virginia; and

50 (2) In accordance with the provisions of section one,
51 article five of said chapter twenty-nine-a, all of the testi-
52 mony at any such hearing shall be recorded by steno-
53 graphic notes and characters or by mechanical means.
54 Such reported testimony shall in every appeal hearing
55 under this article be transcribed.

56 (e) Any such appeal hearing shall be conducted by a
57 quorum of the board, but the parties may by stipulation
58 agree to take evidence before a hearing examiner em-
59 ployed by the board. Upon request of any party to the
60 appeal, the evidence taken before a hearing examiner
61 shall be taken in the county in which the modification is
62 proposed to take place, or, if the modification is to take
63 place in more than one county, the hearing shall be held
64 in the county most extensively affected by the modifica-
65 tion. For the purpose of conducting such appeal hearing,
66 any member of the board and the secretary thereof shall
67 have the power and authority to issue subpoenas duces
68 tecum in the name of the board, in accordance with the
69 provisions of section one, article five, chapter twenty-
70 nine-a of this code. All subpoenas and subpoenas duces

71 tecum shall be issued and served within the time and for
72 the fees and shall be enforced, as specified in section one,
73 article five of said chapter twenty-nine-a, and all of the
74 said section one provisions dealing with subpoenas and
75 subpoenas duces tecum shall apply to subpoenas and sub-
76 poenas duces tecum issued for the purpose of an appeal
77 hearing hereunder.

78 (f) Any such hearing shall be held within twenty days
79 after the date upon which the board received the timely
80 notice of appeal, unless there is a postponement or con-
81 tinuance. The board may postpone or continue any hear-
82 ing upon its own motion, or upon application of the
83 appellant, the appellee or any intervenors for good cause
84 shown. The chief shall be represented at any such hear-
85 ing by the attorney general or his assistant. At any such
86 hearing the appellant and any intervenor may represent
87 himself or be represented by an attorney at law admitted
88 to practice before any circuit court of this state.

89 (g) After such hearing and consideration of all the
90 testimony, evidence and record in the case, the board
91 shall make and enter an order affirming, modifying or

92 vacating the order of the chief, or shall make and enter
93 such order as the chief should have entered, or shall make
94 and enter an order approving or modifying the terms and
95 conditions of any permit issued. In determining its course
96 of action, the board shall take into consideration the
97 factors which the chief had to consider in making his
98 order, and fixing the terms and conditions of such permit,
99 as set forth in section eight or nine of this article, as the
100 case may be.

101 (h) Such order shall be accompanied by findings of
102 fact and conclusions of law as specified in section three,
103 article five, chapter twenty-nine-a of this code, and a
104 copy of such order and accompanying findings and con-
105 clusions shall be served upon the appellant, and any in-
106 tervenors, and their attorneys of record, if any, and upon
107 the appellee in person or by registered or certified mail.

108 (i) The board shall also cause a notice to be served
109 with the copy of such order, which notice shall advise the
110 appellant, the appellee and any intervenors of their right
111 to judicial review, in accordance with the provisions of
112 section eleven of this article. The order of the board shall

113 be final unless vacated or modified upon judicial review
114 thereof in accordance with the provisions of section
115 eleven of this article.

§20-5B-11. Judicial review.

1 (a) Any person or the chief adversely affected by a
2 final order made and entered by the board after such
3 appeal hearing, held in accordance with the provisions
4 of section ten of this article, is entitled to judicial review
5 thereof. All of the pertinent provisions of section four,
6 article five, chapter twenty-nine-a of this code shall apply
7 to and govern such review with like effect as if the pro-
8 visions of said section four were set forth in extenso in this
9 section, with the following modifications or exceptions:

10 (1) As to cases involving an order denying an applica-
11 tion for a permit, or approving or modifying the terms
12 and conditions of a permit, the petition shall be filed, with-
13 in the time specified in said section four, in the circuit
14 court of any county in which such modification is pro-
15 posed to be made.

16 (2) As to cases involving an order revoking or suspend-
17 ing a permit and directing any and all work on such

18 modification to stop, or directing that affirmative action
19 be taken to correct alleged and specified deficiencies con-
20 cerning any such modification, the petition shall be filed,
21 within the time specified in said section four, in the cir-
22 cuit court of any county in which any part of such modi-
23 fication is proposed to be made.

24 (b) The judgment of the circuit court shall be final
25 unless reversed, vacated or modified on appeal to the
26 supreme court of appeals in accordance with the provi-
27 sions of section one, article six, chapter twenty-nine-a of
28 this code, except that notwithstanding the provisions of
29 said section one, the petition seeking such review must
30 be filed with said supreme court of appeals within ninety
31 days of the date of entry of the judgment of the circuit
32 court.

33 (c) Legal counsel and services for the chief in all ap-
34 peal proceedings in the circuit court and in the supreme
35 court of appeals of this state shall be provided by the
36 attorney general or his assistant and in appeal proceed-
37 ings in the circuit courts of the prosecuting attorneys of
38 the several counties as well, all without additional

39 compensation, or the board or chief, with the written ap-
40 proval of the attorney general may employ special coun-
41 sel to represent the board or chief in a particular pro-
42 ceeding.

§20-5B-12. Actions to abate nuisances; injunctive relief.

1 Whether any violation of the provisions of this article
2 or any final order of the chief or the board shall result
3 in prosecution or conviction or not, any such violation
4 shall be deemed a nuisance which may be abated upon
5 application by the chief to the circuit court of the county
6 in which such nuisance or any part thereof shall exist, or
7 to the judge thereof in vacation. Upon application by the
8 chief, the circuit courts of this state may by mandatory
9 or prohibitive injunction compel compliance with all final
10 orders of the chief or board. Any application for an in-
11 junction to compel compliance with any final order of the
12 chief or board shall be made to the circuit court of any
13 county in which the modification to which the order re-
14 lates is proposed to be made, or in which the modification
15 to which the order relates is situate or would be situate
16 upon completion thereof. Upon application by the chief

17 to the circuit court of the county in which a municipal
18 corporation is located, or in which any person resides or
19 does business, or to the judge thereof in vacation, such
20 court may by injunction require the performance of any
21 duty imposed upon such municipal corporation or person
22 by the provisions of this article. The court may issue a
23 temporary injunction in any case pending a decision on
24 the merits of any application filed. In cases of modifica-
25 tions where irreparable damage will result from any
26 delay incident to the administrative procedures set forth
27 in this article, the chief, with the consent of the director,
28 may forthwith apply to the circuit court of any county
29 in which the modification is taking place for a temporary
30 injunction. Such court may issue a temporary injunction
31 pending final disposition of the case by the chief or the
32 board, in the event an appeal is taken to the board.

33 The judgment of the circuit court upon any application
34 permitted by the provisions of this section shall be final
35 unless reversed, vacated or modified on appeal to the su-
36 preme court of appeals. Any such appeal shall be sought
37 in a manner provided by law for appeals for circuit courts

38 in other civil cases, except that the petition seeking such
39 review must be filed with said supreme court of appeals
40 within ninety days from the date of entry of the judgment
41 of the circuit court.

42 The chief shall be represented in all such proceedings
43 by the attorney general or his assistant and in such pro-
44 ceedings in the circuit court by the prosecuting attorneys
45 of the several counties as well, all without additional
46 compensation.

§20-5B-13. Priority of actions.

1 All applications under section twelve of this article
2 and all proceedings for judicial review under section
3 eleven of this article shall take priority on the docket
4 of the circuit court in which pending, and shall take
5 precedence over all other civil cases. Where such appli-
6 cations and proceedings for judicial review are pending
7 at the same time, such applications shall take priority
8 on the docket and shall take precedence over proceed-
9 ings for judicial review.

§20-5B-14. Violations; criminal penalties.

1 Any person who fails or refuses to discharge any duty
2 imposed upon him by this article or by any final order

3 of the chief or board, or who fails or refuses to apply
4 for and obtain a permit as required by the provisions
5 of this article, shall be guilty of a misdemeanor, and,
6 upon conviction thereof, shall be punished for a first
7 offense by a fine of not less than twenty-five dollars nor
8 more than one hundred dollars, and for a second offense
9 by a fine of not less than two hundred dollars nor more
10 than five hundred dollars, and for a third offense and
11 each subsequent offense by a fine of not less than five
12 hundred dollars nor more than one thousand dollars
13 or by imprisonment for a period not to exceed six
14 months, or in the discretion of the court by both such
15 fine and imprisonment.

§20-5B-15. Exceptions as to criminal liabilities.

1 The criminal liabilities imposed by section fourteen
2 of this article shall not be construed to include any vio-
3 lation resulting from accident or caused by an act of
4 God, war, strike, riot or other catastrophe as to which
5 negligence or willful conduct on the part of such person
6 was not the approximate cause.

§20-5B-16. Short title.

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

§20-5B-17. Severability of provisions.

1 If any provision of this article or the application thereof
2 to any person or circumstance is held invalid, such in-
3 validity shall not affect other provisions or applications
4 of the article which can be given effect without the invalid
5 provision or its application, and to this end the provisions
6 of this article are declared to be severable.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

William Tanager
Chairman Senate Committee

Clayton C. Rauscher
Chairman House Committee

Originated in the Senate.

To take effect from passage.

Howard Meyer
Clerk of the Senate

C. A. Blenkinship
Clerk of the House of Delegates

Lloyd G. Johnson
President of the Senate

Wor. F. Boevisky
Speaker House of Delegates

The within approved this the 17th
day of March, 1969.

Arch. A. Shouse Jr.
Governor



PRESENTED TO THE
GOVERNOR

Date 3/14/69

Time 2:20 p.m.