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FEDERAL GOVERNMENT
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WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 2000



ENROLLED

Committee Substitute for
SENATE BILL NO. 372

(By Senators Mitchell and Hunter)



PASSED March 11, 2000
In Effect ninety days from Passage

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SENATE CLERK
STATE HOUSE

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COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 372

(SENATORS MITCHELL AND HUNTER, *original sponsors*)

[Passed March 11, 2000; in effect ninety days from passage.]

AN ACT to amend and reenact section four, article five, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend and reenact section two, article five-a of said chapter, all relating generally to the offense of driving under the influence of alcohol, controlled substances or drugs; procedures for conducting a secondary test; administrative sanctions for driving under the influence; and amending the hearing procedure for revocation of license.

Be it enacted by the Legislature of West Virginia:

That section four, article five, chapter seventeen-c of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that section two,

article five-a of said chapter be amended and reenacted, all to read as follows:

ARTICLE 5. SERIOUS TRAFFIC OFFENSES.

§17C-5-4. Implied consent to test; administration at direction of law-enforcement officer; designation of type of test; definition of law-enforcement officer.

1 Any person who drives a motor vehicle in this state shall
2 be deemed to have given his consent by the operation
3 thereof, subject to the provisions of this article, to a
4 preliminary breath analysis and a secondary chemical test
5 of either his blood, breath or urine for the purposes of
6 determining the alcoholic content of his blood. A prelimi-
7 nary breath analysis may be administered in accordance
8 with the provisions of section five of this article whenever
9 a law-enforcement officer has reasonable cause to believe
10 a person to have committed an offense prohibited by
11 section two of this article or by an ordinance of a municipi-
12 pality of this state which has the same elements as an
13 offense described in said section two of this article. A
14 secondary test of blood, breath or urine shall be incidental
15 to a lawful arrest and shall be administered at the direc-
16 tion of the arresting law-enforcement officer having
17 reasonable grounds to believe the person to have commit-
18 ted an offense prohibited by section two of this article or
19 by an ordinance of a municipality of this state which has
20 the same elements as an offense described in said section
21 two of this article. The law-enforcement agency by which
22 such law-enforcement officer is employed shall designate
23 which one of the aforesaid secondary tests shall be admin-
24 istered: *Provided*, That if the test so designated is a blood
25 test and the person so arrested refuses to submit to such
26 blood test, then the law-enforcement officer making such
27 arrest shall designate in lieu thereof, either a breath or
28 urine test to be administered, and notwithstanding the
29 provisions of section seven of this article, such refusal to

30 submit to a blood test only shall not result in the revoca-
31 tion of the arrested person's license to operate a motor
32 vehicle in this state. Any person to whom a preliminary
33 breath test is administered who is then arrested shall be
34 given a written statement advising him that his refusal to
35 submit to the secondary chemical test finally designated as
36 provided in this section, will result in the revocation of his
37 license to operate a motor vehicle in this state for a period
38 of at least one year and up to life.

39 For the purpose of this article, the term "law-enforce-
40 ment officer" or "police officer" shall mean and be limited
41 to: (1) Any member of the department of public safety of
42 this state; (2) any sheriff and any deputy sheriff of any
43 county; (3) any member of a police department in any
44 municipality as defined in section two, article one, chapter
45 eight of this code; (4) any conservation officer of the
46 division of natural resources; and (5) any special police
47 officer appointed by the governor pursuant to the provi-
48 sions of section forty-one, article three, chapter sixty-one
49 of this code who has completed the course of instruction at
50 a law-enforcement training academy as provided for under
51 the provisions of section nine, article twenty-nine, chapter
52 thirty of this code. Any law-enforcement officer who has
53 been properly trained in the administration of any second-
54 ary chemical test which a law-enforcement officer may
55 conduct under this article, including, but not limited to,
56 certification by the division of health in the operation of
57 any equipment required for the collection and analysis of
58 a breath sample, may conduct such test at any location in
59 the county wherein the arrest is made that the equipment
60 and the facilities may be found. However, when the
61 arresting officer lacks such training, then any other law-
62 enforcement officer who has received training in the
63 administration of the secondary chemical test to be
64 administered may, upon the request of such arresting
65 law-enforcement officer and in his presence, conduct such

66 secondary test and the results of such test may be used in
67 evidence to the same extent and in the same manner as if
68 such test had been conducted by such arresting law-
69 enforcement officer. Only the person actually administer-
70 ing or conducting such test shall be competent to testify as
71 to the results and the veracity of such test.

**ARTICLE 5A. ADMINISTRATIVE PROCEDURES FOR SUSPENSION AND
REVOCATION OF LICENSES FOR DRIVING UNDER THE
INFLUENCE OF ALCOHOL, CONTROLLED SUB-
STANCES OR DRUGS.**

§17C-5A-2. Hearing; revocation; review.

1 (a) Upon the written request of a person whose license to
2 operate a motor vehicle in this state has been revoked or
3 suspended under the provisions of section one of this
4 article or section seven, article five of this chapter, the
5 commissioner of motor vehicles shall stay the imposition
6 of the period of revocation or suspension and afford the
7 person an opportunity to be heard. The written request
8 must be filed with the commissioner in person or by
9 registered or certified mail, return receipt requested,
10 within thirty calendar days after receipt of a copy of the
11 order of revocation or suspension or no hearing will be
12 granted. The hearing shall be before the commissioner or
13 a hearing examiner retained by the commissioner who
14 shall rule on evidentiary issues and submit proposed
15 findings of fact and conclusions of law for the consider-
16 ation of the commissioner and all of the pertinent provi-
17 sions of article five, chapter twenty-nine-a of this code
18 shall apply. The hearing shall be held at an office of the
19 division located in or near the county wherein the arrest
20 was made in this state or at some other suitable place in
21 the county wherein the arrest was made if an office of the
22 division is not available.

23 (b) Any such hearing shall be held within one hundred
24 eighty days after the date upon which the commissioner

25 received the timely written request therefor, unless there
26 is a postponement or continuance. The commissioner may
27 postpone or continue any hearing on the commissioner's
28 own motion, or upon application for each person for good
29 cause shown. The commissioner shall adopt and imple-
30 ment by a procedural rule written policies governing the
31 postponement or continuance of any such hearing on the
32 commissioner's own motion or for the benefit of any law-
33 enforcement officer or any person requesting the hearing,
34 and such policies shall be enforced and applied to all
35 parties equally. For the purpose of conducting the hear-
36 ing, the commissioner shall have the power and authority
37 to issue subpoenas and subpoenas duces tecum in accor-
38 dance with the provisions of section one, article five,
39 chapter twenty-nine-a of this code: *Provided*, That the
40 notice of hearing to the appropriate law-enforcement
41 officers by registered or certified mail, return receipt
42 requested, shall constitute a subpoena to appear at the
43 hearing without the necessity of payment of fees by the
44 division of motor vehicles.

45 (c) Law-enforcement officers shall be compensated for
46 the time expended in their travel and appearance before
47 the commissioner by the law-enforcement agency by
48 whom they are employed at their regular rate if they are
49 scheduled to be on duty during said time or at their
50 regular overtime rate if they are scheduled to be off duty
51 during said time.

52 (d) The principal question at the hearing shall be
53 whether the person did drive a motor vehicle while under
54 the influence of alcohol, controlled substances or drugs, or
55 did drive a motor vehicle while having an alcohol concen-
56 tration in the person's blood of ten hundredths of one
57 percent or more, by weight, or did refuse to submit to the
58 designated secondary chemical test, or did drive a motor
59 vehicle while under the age of twenty-one years with an

60 alcohol concentration in his or her blood of two hun-
61 dredths of one percent or more, by weight, but less than
62 ten hundredths of one percent, by weight.

63 The commissioner may propose a legislative rule in
64 compliance with the provisions of article three, chapter
65 twenty-nine-a of this code, which rule may provide that if
66 a person accused of driving a motor vehicle while under
67 the influence of alcohol, controlled substances or drugs, or
68 accused of driving a motor vehicle while having an alcohol
69 concentration in the person's blood of ten hundredths of
70 one percent or more, by weight, or accused of driving a
71 motor vehicle while under the age of twenty-one years
72 with an alcohol concentration in his or her blood of two
73 hundredths of one percent or more, by weight, but less
74 than ten hundredths of one percent, by weight, intends to
75 challenge the results of any secondary chemical test of
76 blood, breath or urine, or intends to cross-examine the
77 individual or individuals who administered the test or
78 performed the chemical analysis, the person shall, within
79 an appropriate period of time prior to the hearing, notify
80 the commissioner in writing of such intention. The rule
81 may provide that when there is a failure to comply with
82 the notice requirement, the results of the secondary test, if
83 any, shall be admissible as though the person and the
84 commissioner had stipulated the admissibility of such
85 evidence. Any such rule shall provide that the rule shall
86 not be invoked in the case of a person who is not repre-
87 sented by counsel unless the communication from the
88 commissioner to the person establishing a time and place
89 for the hearing also informed the person of the conse-
90 quences of the person's failure to timely notify the com-
91 missioner of the person's intention to challenge the results
92 of the secondary chemical test or cross-examine the
93 individual or individuals who administered the test or
94 performed the chemical analysis.

95 (e) In the case of a hearing wherein a person is accused of
96 driving a motor vehicle while under the influence of
97 alcohol, controlled substances or drugs, or accused of
98 driving a motor vehicle while having an alcohol concentra-
99 tion in the person's blood of ten hundredths of one percent
100 or more, by weight, or accused of driving a motor vehicle
101 while under the age of twenty-one years with an alcohol
102 concentration in his or her blood of two hundredths of one
103 percent or more, by weight, but less than ten hundredths
104 of one percent, by weight, the commissioner shall make
105 specific findings as to: (1) Whether the arresting law-
106 enforcement officer had reasonable grounds to believe the
107 person to have been driving while under the influence of
108 alcohol, controlled substances or drugs, or while having an
109 alcohol concentration in the person's blood of ten hun-
110 dredths of one percent or more, by weight, or to have been
111 driving a motor vehicle while under the age of twenty-one
112 years with an alcohol concentration in his or her blood of
113 two hundredths of one percent or more, by weight, but less
114 than ten hundredths of one percent, by weight; (2) whether
115 the person was lawfully placed under arrest for an offense
116 involving driving under the influence of alcohol, controlled
117 substances or drugs, or was lawfully taken into custody for
118 the purpose of administering a secondary test; and (3)
119 whether the tests, if any, were administered in accordance
120 with the provisions of this article and article five of this
121 chapter.

122 (f) If, in addition to a finding that the person did drive a
123 motor vehicle while under the influence of alcohol, con-
124 trolled substances or drugs, or did drive a motor vehicle
125 while having an alcohol concentration in the person's
126 blood of ten hundredths of one percent or more, by weight,
127 or did drive a motor vehicle while under the age of
128 twenty-one years with an alcohol concentration in his or
129 her blood of two hundredths of one percent or more, by
130 weight, but less than ten hundredths of one percent, by

131 weight, the commissioner also finds by a preponderance of
132 the evidence that the person when so driving did an act
133 forbidden by law or failed to perform a duty imposed by
134 law, which act or failure proximately caused the death of
135 a person and was committed in reckless disregard of the
136 safety of others, and if the commissioner further finds that
137 the influence of alcohol, controlled substances or drugs or
138 the alcohol concentration in the blood was a contributing
139 cause to the death, the commissioner shall revoke the
140 person's license for a period of ten years: *Provided*, That
141 if the commissioner has previously suspended or revoked
142 the person's license under the provisions of this section or
143 section one of this article within the ten years immediately
144 preceding the date of arrest, the period of revocation shall
145 be for the life of the person.

146 (g) If, in addition to a finding that the person did drive a
147 motor vehicle while under the influence of alcohol, con-
148 trolled substances or drugs, or did drive a motor vehicle
149 while having an alcohol concentration in the person's
150 blood of ten hundredths of one percent or more, by weight,
151 the commissioner also finds by a preponderance of the
152 evidence that the person when so driving did an act
153 forbidden by law or failed to perform a duty imposed by
154 law, which act or failure proximately caused the death of
155 a person, the commissioner shall revoke the person's
156 license for a period of five years: *Provided*, That if the
157 commissioner has previously suspended or revoked the
158 person's license under the provisions of this section or
159 section one of this article within the ten years immediately
160 preceding the date of arrest, the period of revocation shall
161 be for the life of the person.

162 (h) If, in addition to a finding that the person did drive
163 a motor vehicle while under the influence of alcohol,
164 controlled substances or drugs, or did drive a motor
165 vehicle while having an alcohol concentration in the

166 person's blood of ten hundredths of one percent or more,
167 by weight, the commissioner also finds by a preponderance
168 of the evidence that the person when so driving did an act
169 forbidden by law or failed to perform a duty imposed by
170 law, which act or failure proximately caused bodily injury
171 to a person other than himself or herself, the commissioner
172 shall revoke the person's license for a period of two years:
173 *Provided*, That if the commissioner has previously sus-
174 pended or revoked the person's license under the provi-
175 sions of this section or section one of this article within the
176 ten years immediately preceding the date of arrest, the
177 period of revocation shall be ten years: *Provided, how-*
178 *ever*, That if the commissioner has previously suspended or
179 revoked the person's license more than once under the
180 provisions of this section or section one of this article
181 within the ten years immediately preceding the date of
182 arrest, the period of revocation shall be for the life of the
183 person.

184 (i) If the commissioner finds by a preponderance of the
185 evidence that the person did drive a motor vehicle while
186 under the influence of alcohol, controlled substances or
187 drugs, or did drive a motor vehicle while having an alcohol
188 concentration in the person's blood of ten hundredths of
189 one percent or more, by weight, or finds that the person,
190 being an habitual user of narcotic drugs or amphetamine
191 or any derivative thereof, did drive a motor vehicle, or
192 finds that the person knowingly permitted the person's
193 vehicle to be driven by another person who was under the
194 influence of alcohol, controlled substances or drugs, or
195 knowingly permitted the person's vehicle to be driven by
196 another person who had an alcohol concentration in his or
197 her blood of ten hundredths of one percent or more, by
198 weight, the commissioner shall revoke the person's license
199 for a period of six months: *Provided*, That if the commis-
200 sioner has previously suspended or revoked the person's
201 license under the provisions of this section or section one

202 of this article within the ten years immediately preceding
203 the date of arrest, the period of revocation shall be ten
204 years: *Provided, however,* That if the commissioner has
205 previously suspended or revoked the person's license more
206 than once under the provisions of this section or section
207 one of this article within the ten years immediately
208 preceding the date of arrest, the period of revocation shall
209 be for the life of the person.

210 (j) If, in addition to a finding that the person did drive a
211 motor vehicle while under the age of twenty-one years
212 with an alcohol concentration in his or her blood of two
213 hundredths of one percent or more, by weight, but less
214 than ten hundredths of one percent, by weight, the com-
215 missioner also finds by a preponderance of the evidence
216 that the person when so driving did an act forbidden by
217 law or failed to perform a duty imposed by law, which act
218 or failure proximately caused the death of a person, and if
219 the commissioner further finds that the alcohol concentra-
220 tion in the blood was a contributing cause to the death, the
221 commissioner shall revoke the person's license for a period
222 of five years: *Provided,* That if the commissioner has
223 previously suspended or revoked the person's license under
224 the provisions of this section or section one of this article
225 within the ten years immediately preceding the date of
226 arrest, the period of revocation shall be for the life of the
227 person.

228 (k) If, in addition to a finding that the person did drive
229 a motor vehicle while under the age of twenty-one years
230 with an alcohol concentration in his blood of two hun-
231 dredths of one percent or more, by weight, but less than
232 ten hundredths of one percent, by weight, the commis-
233 sioner also finds by a preponderance of the evidence that
234 the person when so driving did an act forbidden by law or
235 failed to perform a duty imposed by law, which act or
236 failure proximately caused bodily injury to a person other

237 than himself or herself, and if the commissioner further
238 finds that the alcohol concentration in the blood was a
239 contributing cause to the bodily injury, the commissioner
240 shall revoke the person's license for a period of two years:
241 *Provided*, That if the commissioner has previously sus-
242 pended or revoked the person's license under the provi-
243 sions of this section or section one of this article within the
244 ten years immediately preceding the date of arrest, the
245 period of revocation shall be ten years: *Provided, how-*
246 *ever*, That if the commissioner has previously suspended or
247 revoked the person's license more than once under the
248 provisions of this section or section one of this article
249 within the ten years immediately preceding the date of
250 arrest, the period of revocation shall be for the life of the
251 person.

252 (l) If the commissioner finds by a preponderance of the
253 evidence that the person did drive a motor vehicle while
254 under the age of twenty-one years with an alcohol concen-
255 tration in his or her blood of two hundredths of one
256 percent or more, by weight, but less than ten hundredths
257 of one percent, by weight, the commissioner shall suspend
258 the person's license for a period of sixty days: *Provided*,
259 That if the commissioner has previously suspended or
260 revoked the person's license under the provisions of this
261 section or section one of this article, the period of revoca-
262 tion shall be for one year, or until the person's twenty-first
263 birthday, whichever period is longer.

264 (m) If, in addition to a finding that the person did drive
265 a motor vehicle while under the influence of alcohol,
266 controlled substances or drugs, or did drive a motor
267 vehicle while having an alcohol concentration in the
268 person's blood of ten hundredths of one percent or more,
269 by weight, the commissioner also finds by a preponderance
270 of the evidence that the person when so driving did have
271 on or within the motor vehicle another person who has not

272 reached his or her sixteenth birthday, the commissioner
273 shall revoke the person's license for a period of one year:
274 *Provided*, That if the commissioner has previously sus-
275 pended or revoked the person's license under the provi-
276 sions of this section or section one of this article within the
277 ten years immediately preceding the date of arrest, the
278 period of revocation shall be ten years: *Provided, how-*
279 *ever*, That if the commissioner has previously suspended or
280 revoked the person's license more than once under the
281 provisions of this section or section one of this article
282 within the ten years immediately preceding the date of
283 arrest, the period of revocation shall be for the life of the
284 person.

285 (n) For purposes of this section, where reference is made
286 to previous suspensions or revocations under this section,
287 the following types of criminal convictions or administra-
288 tive suspensions or revocations shall also be regarded as
289 suspensions or revocations under this section or section
290 one of this article:

291 (1) Any administrative revocation under the provisions
292 of the prior enactment of this section for conduct which
293 occurred within the ten years immediately preceding the
294 date of arrest.

295 (2) Any suspension or revocation on the basis of a
296 conviction under a municipal ordinance of another state or
297 a statute of the United States or of any other state of an
298 offense which has the same elements as an offense de-
299 scribed in section two, article five of this chapter, for
300 conduct which occurred within the ten years immediately
301 preceding the date of arrest.

302 (3) Any revocation under the provisions of section seven,
303 article five of this chapter, for conduct which occurred
304 within the ten years immediately preceding the date of
305 arrest.

306 (o) In the case of a hearing wherein a person is accused
307 of refusing to submit to a designated secondary test, the
308 commissioner shall make specific findings as to: (1)
309 Whether the arresting law-enforcement officer had
310 reasonable grounds to believe the person had been driving
311 a motor vehicle in this state while under the influence of
312 alcohol, controlled substances or drugs; (2) whether the
313 person was lawfully placed under arrest for an offense
314 relating to driving a motor vehicle in this state while under
315 the influence of alcohol, controlled substances or drugs; (3)
316 whether the person refused to submit to the secondary test
317 finally designated in the manner provided in section four,
318 article five of this chapter; and (4) whether the person had
319 been given a written statement advising the person that
320 the person's license to operate a motor vehicle in this state
321 would be revoked for at least one year and up to life if the
322 person refused to submit to the test finally designated in
323 the manner provided in section four, article five of this
324 chapter.

325 (p) If the commissioner finds by a preponderance of the
326 evidence that: (1) The arresting law-enforcement officer
327 had reasonable grounds to believe the person had been
328 driving a motor vehicle in this state while under the
329 influence of alcohol, controlled substances or drugs; (2) the
330 person was lawfully placed under arrest for an offense
331 relating to driving a motor vehicle in this state while under
332 the influence of alcohol, controlled substances or drugs; (3)
333 the person refused to submit to the secondary chemical
334 test finally designated; and (4) the person had been given
335 a written statement advising the person that the person's
336 license to operate a motor vehicle in this state would be
337 revoked for a period of at least one year and up to life if
338 the person refused to submit to the test finally designated,
339 the commissioner shall revoke the person's license to
340 operate a motor vehicle in this state for the periods
341 specified in section seven, article five of this chapter. The

342 revocation period prescribed in this subsection shall run
343 concurrently with any other revocation period ordered
344 under this section or section one of this article arising out
345 of the same occurrence.

346 (q) If the commissioner finds to the contrary with respect
347 to the above issues, the commissioner shall rescind his or
348 her earlier order of revocation or shall reduce the order of
349 revocation to the appropriate period of revocation under
350 this section, or section seven, article five of this chapter.

351 A copy of the commissioner's order made and entered
352 following the hearing shall be served upon the person by
353 registered or certified mail, return receipt requested.
354 During the pendency of any such hearing, the revocation
355 of the person's license to operate a motor vehicle in this
356 state shall be stayed.

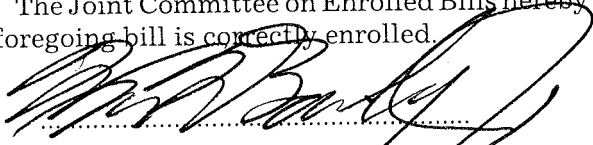
357 If the commissioner shall after hearing make and enter
358 an order affirming the commissioner's earlier order of
359 revocation, the person shall be entitled to judicial review
360 as set forth in chapter twenty-nine-a of this code. The
361 commissioner may not stay enforcement of the order. The
362 court may grant a stay or supersedeas of the order only
363 upon motion and hearing, and a finding by the court upon
364 the evidence presented, that there is a substantial proba-
365 bility that the appellant shall prevail upon the merits, and
366 the appellant will suffer irreparable harm if the order is
367 not stayed: *Provided*, That in no event shall the stay or
368 supersedeas of the order exceed one hundred fifty days.
369 Notwithstanding the provisions of section four, article
370 five, chapter twenty-nine-a of this code, the commissioner
371 may not be compelled to transmit a certified copy of the
372 transcript of the hearing to the circuit court in less than
373 sixty days.

374 (r) In any revocation or suspension pursuant to this
375 section, if the driver whose license is revoked or suspended

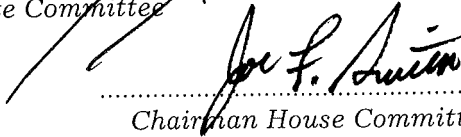
376 had not reached the driver's eighteenth birthday at the
377 time of the conduct for which the license is revoked or
378 suspended, the driver's license shall be revoked or sus-
379 pended until the driver's eighteenth birthday, or the
380 applicable statutory period of revocation or suspension
381 prescribed by this section, whichever is longer.

382 (s) Funds for this section's hearing and appeal process
383 may be provided from the drunk driving prevention fund,
384 as created by section forty-one, article two, chapter fifteen
385 of this code, upon application for such funds to the
386 commission on drunk driving prevention.

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



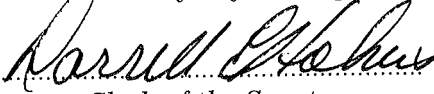
Chairman Senate Committee



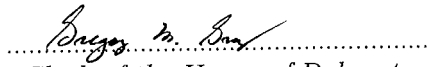
Chairman House Committee

Originating in the Senate.

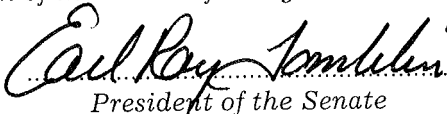
In effect ninety days from passage.



Clerk of the Senate



Clerk of the House of Delegates

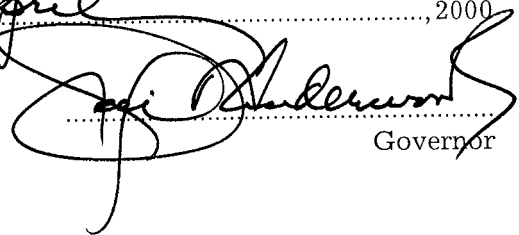


President of the Senate



Speaker House of Delegates

The within approved this the 3rd
Day of April, 2000



Governor

PRESENTED TO THE

GOVERNOR

Date 3/31/00

Time 2:50 pm