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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**WEST VIRGINIA LEGISLATURE**  
*Regular Session, 2004*



**ENROLLED**

*Committee Substitute for*

**SENATE BILL NO. 163**

*(By Senators Tomblin, Mr. President, and Sprouse, Jr  
By Request of the Executive)*



**PASSED March 13, 2004**

**In Effect 90 days from Passage**

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COMMITTEE SUBSTITUTE

FOR

**Senate Bill No. 163**

(BY SENATORS TOMBLIN, MR. PRESIDENT, AND SPROUSE,  
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AN ACT to amend the code of West Virginia, 1931, as amended, by adding thereto a new article, designated §22-25-1, §22-25-2, §22-25-3, §22-25-4, §22-25-5 and §22-25-6, all relating to establishing the water resources protection act; providing legislative findings; finding that the state reserves a sovereign interest in the waters of the state as a valuable public resource; defining terms; declaring the state shall claim and protect state waters for the use and benefit of its citizens; providing for preservation of common law rights; providing that a water use survey and registration of large users of state waters be undertaken by the secretary of the department of environmental protection; requiring the secretary to coordinate survey with state agencies and report to a legislative oversight commission; requiring persons making withdrawals exceeding seven hundred fifty thousand gallons per month to participate in survey and registration; requiring

the secretary to use reasonable alternatives for estimating usage; requiring persons participating in survey and registration to submit accurate information; providing limited exceptions to survey and registration participation; authorizing the secretary to coordinate with other state agencies and the United States geological survey; directing the department of environmental protection to propose a strategy for water management; authorizing secretary of department of environmental protection to promulgate rules; establishing confidentiality of submitted information and exceptions; providing criteria for requesting and receiving confidentiality designation; establishing requirements for requesting confidential documents and appeal process; establishing a joint legislative oversight commission to monitor survey and develop policies; and providing civil penalties for noncompliance.

*Be it enacted by the Legislature of West Virginia:*

That the code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §22-25-1, §22-25-2, §22-25-3, §22-25-4, §22-25-5 and §22-25-6, all to read as follows:

**ARTICLE 25. WATER RESOURCES PROTECTION ACT.**

**§22-25-1. Short title; legislative findings.**

1 (a) Short title - This article may be known and cited as  
2 the "Water Resources Protection Act".

3 (b) Legislative findings:

4 (1) The West Virginia Legislature finds that it is the  
5 public policy of the state of West Virginia to protect and  
6 conserve the water resources for the state and to provide  
7 for the public welfare. The state's water resources are  
8 vital natural resources of the state that are essential to  
9 maintain, preserve and promote quality of life and eco-  
10 nomic vitality of the state.

11 (2) The West Virginia Legislature further finds that it is  
12 the public policy of the state that the water resources of  
13 the state be available for the benefit of the citizens of West  
14 Virginia, consistent with and preserving all other existing  
15 rights and remedies recognized in common law or by  
16 statute, while also preserving this resource within its  
17 sovereign powers for the common good.

**§22-25-2. Definitions.**

1 For purposes of this article, the following words have the  
2 meanings assigned unless the context indicates otherwise:

3 (a) "Beneficial use" means uses that include, but are not  
4 limited to, public or private water supplies, agriculture,  
5 tourism, commercial, industrial, coal, oil and gas and other  
6 mineral extraction, preservation of fish and wildlife  
7 habitat, maintenance of waste assimilation, recreation,  
8 navigation and preservation of cultural values.

9 (b) "Consumptive withdrawal" means any withdrawal of  
10 water which returns less water to the water body than is  
11 withdrawn.

12 (c) "Farm use" means irrigation of any land used for  
13 general farming, forage, aquiculture, pasture, orchards,  
14 nurseries, the provision of water supply for farm animals,  
15 poultry farming or any other activity conducted in the  
16 course of a farming operation.

17 (d) "Interbasin transfer" means the permanent removal  
18 of water from the watershed from which it is withdrawn.

19 (e) "Maximum potential" means the maximum designed  
20 capacity of a facility to withdraw water under its physical  
21 and operational design.

22 (f) "Person", "persons" or "people" means an individual,  
23 public and private business or industry, public or private  
24 water service and governmental entity.

25 (g) "Nonconsumptive withdrawal" means any with-  
26 drawal of water which is not a consumptive withdrawal as  
27 defined in this section.

28 (h) "Secretary" means the secretary of the department of  
29 environmental protection or his or her designee.

30 (i) "Water resources", "water" or "waters" means any  
31 and all water on or beneath the surface of the ground,  
32 whether percolating, standing, diffused or flowing, wholly  
33 or partially within this state, or bordering this state and  
34 within its jurisdiction, and includes, without limiting the  
35 generality of the foregoing, natural or artificial lakes,  
36 rivers, streams, creeks, branches, brooks, ponds, impound-  
37 ing reservoirs, springs, wells, watercourses and wetlands:  
38 *Provided*, That farm ponds, industrial settling basins and  
39 ponds and waste treatment facilities are excluded from the  
40 waters of the state.

41 (j) "Watershed" means a hydrologic unit utilized by the  
42 United States department of interior's geological survey,  
43 adopted in 1974, as a framework for detailed water and  
44 related land-resource planning, denoted by an eight digit  
45 hydrologic unit code, and by which West Virginia is, as of  
46 the effective date of the act, divided into thirty-two  
47 separate hydrologic units.

48 (k) "Withdrawal" means the removal or capture of water  
49 from a water resource of the state regardless of whether it  
50 is consumptive or nonconsumptive: *Provided*, that water  
51 encountered during coal, oil, gas or other mineral extrac-  
52 tion and diverted, but not used for any purpose and not a  
53 factor in low flow conditions for any surface water or  
54 groundwater, is not deemed a withdrawal.

**§22-25-3. Waters claimed by state; water resources protection  
survey; need for study; registration requirements;  
agency cooperation; information gathering.**

1 (a) The waters of the state of West Virginia are hereby  
2 claimed as valuable public natural resources held by the

3 state for the use and benefit of its citizens. The state shall  
4 manage the quantity of its waters effectively for present  
5 and future use and enjoyment and for the protection of the  
6 environment. Therefore, it is necessary for the state to  
7 determine the nature and extent of its water resources, the  
8 quantity of water being withdrawn or otherwise used and  
9 the nature of the withdrawals or other uses: *Provided,*  
10 That no provisions of this article may be construed to  
11 amend or limit any other rights and remedies created by  
12 statute or common law in existence on the date of the  
13 enactment of this article.

14 (b) The secretary shall conduct a water resources survey  
15 of consumptive and nonconsumptive surface water and  
16 groundwater withdrawals in this state. The secretary shall  
17 determine the form and format of the information submit-  
18 ted, including the use of electronic submissions. The  
19 survey shall collect information covering the years two  
20 thousand three, two thousand four and two thousand five.  
21 The secretary shall establish a statewide registration  
22 program to monitor large quantity users of water resources  
23 of this state beginning in two thousand six.

24 (c) Beginning in the year two thousand three, every  
25 person utilizing the state's water resources whose with-  
26 drawal from a water resource during any month exceeds  
27 seven hundred fifty thousand gallons, except those who  
28 purchase water from a public or private water utility or  
29 other service that is reporting its total withdrawal, shall  
30 provide all requested information regarding withdrawals  
31 of the water resource. Multiple withdrawals of water from  
32 a particular water resource that are made or controlled by  
33 a single person and used at one facility or location shall be  
34 considered a single withdrawal of water. Water with-  
35 drawals for self-supplied farm use and private households  
36 will be estimated. Water utilities regulated by the public  
37 service commission pursuant to article two, chapter  
38 twenty-four of the code are exempted from providing  
39 information on interbasin transfers to the extent those

40 transfers are necessary to provide water utility services  
41 within the state.

42 (d) The secretary shall make a good faith effort to obtain  
43 survey and registration information from persons who are  
44 withdrawing water from an in-state water resource but  
45 who are located outside the state borders.

46 (e) All state agencies that have a regulatory, research or  
47 other function relating to water resources, including, but  
48 not limited to, the state geological and economic survey,  
49 the division of natural resources, the public service  
50 commission, the bureau for public health, the commis-  
51 sioner of the department of agriculture, the office of  
52 emergency services, Marshall university and West Virginia  
53 university may enter into interagency agreements with the  
54 secretary and shall cooperate by: (i) Providing information  
55 relating to the water resources of the state; and (ii) provid-  
56 ing any necessary assistance to the secretary in effectuat-  
57 ing the purposes of this article. The secretary shall  
58 determine the form and format of the information submit-  
59 ted by these agencies.

60 (f) Persons required to participate in the survey and  
61 registration shall provide any reasonably available  
62 information on stream flow conditions that impact with-  
63 drawal rates.

64 (g) Persons required to participate in the survey and  
65 registration shall provide the most accurate information  
66 available on water withdrawal during seasonal conditions  
67 and future potential maximum withdrawals or other  
68 information that the secretary determines is necessary for  
69 the completion of the survey or registration: *Provided,*  
70 That a coal-fired electric generating facility shall also  
71 report the nominal design capacity of the facility, which is  
72 the quantity of water withdrawn by the facility's intake  
73 pumps necessary to operate the facility during a calendar  
74 day.

75 (h) The secretary shall, to the extent reliable water  
76 withdrawal data is reasonably available from sources  
77 other than persons required to provide data and partici-  
78 pate in the survey and registration, utilize that data to  
79 fulfill the requirements of this section. If the data is not  
80 reasonably available to the secretary, persons required to  
81 participate in the survey and registration are required to  
82 provide the data. Registered persons that report with-  
83 draws on an annual basis for a period of three consecu-  
84 tive years are not required to register further withdrawals  
85 unless the amount withdrawn annually varies by more  
86 than ten percent from the three year average. Altering  
87 locations of intakes and discharge points that result in an  
88 impact to the withdrawal of the water resource by an  
89 amount of ten percent or more from the consecutive three  
90 year average shall also be reported.

91 (i) The secretary shall report regularly to the joint  
92 legislative oversight commission on state water resources  
93 to advise the commission of the progress of the survey as  
94 well as any problems that may be encountered in conduct-  
95 ing the survey and to make recommendations on policy  
96 and statutory changes that may be needed.

97 (j) Upon completion of the survey, the secretary shall file  
98 a final report with the joint committee on government and  
99 finance no later than the thirty-first day of December, two  
100 thousand six. In preparing the final report the secretary  
101 shall consult with the commissioner of the department of  
102 agriculture, the bureau for public health, the division of  
103 natural resources and the public service commission. The  
104 final report shall include the following:

105 (1) To the extent the information is available, the  
106 location and quantity of all surface water and groundwa-  
107 ter resources in this state;

108 (2) A discussion of the consumptive and nonconsumptive  
109 withdrawals of surface water and groundwater in this  
110 state;

111 (3) A listing of each person whose consumptive or  
112 nonconsumptive withdrawal during any single month  
113 during the calender year exceeds seven hundred fifty  
114 thousand gallons, including the amount of water used,  
115 location of the water resource, the nature of the use,  
116 location of each intake and discharge point by longitude  
117 and latitude where available and, if the use involves more  
118 than one watershed or basin, the watersheds or basins  
119 involved and the amount transferred;

120 (4) A discussion of any area of concern regarding histori-  
121 cal or current conditions that indicate a low flow condition  
122 or where a drought or flood has occurred or is likely to  
123 occur that threatens the beneficial use of the surface water  
124 or groundwater in the area;

125 (5) Current or potential in-stream or off-stream uses that  
126 contribute to or are likely to exacerbate natural low flow  
127 conditions to the detriment of the water resource;

128 (6) Discussion of a potential groundwater well network  
129 that provides indicators that groundwater levels in an area  
130 are declining or are expected to decline excessively;

131 (7) Potential growth areas where competition for water  
132 resources may be expected;

133 (8) Any occurrence of two or more withdrawals that are  
134 interfering or may reasonably be expected to interfere  
135 with one another;

136 (9) Discussion of practices or methods persons have  
137 implemented to reduce water withdrawals; and

138 (10) Any other information that may be beneficial in  
139 adequately assessing water availability and withdrawal  
140 and in determining the need for and the preparation of  
141 water resources plans.

142 (k) In addition to any requirements for completion of the  
143 survey established by the secretary, the survey must  
144 accurately reflect both actual and maximum potential

145 water withdrawal. Actual withdrawal shall be established  
146 through metering, measuring or alternative accepted  
147 scientific methods to obtain a reasonable estimate or  
148 indirect calculation of actual use.

149 (l) Upon completion of the survey, the secretary shall  
150 make recommendations to the joint legislative oversight  
151 commission created in section five of this article relating  
152 to the need to implement a water quantity management  
153 strategy for the state or regions of the state where the  
154 quantity of water resources are found to be currently  
155 stressed or likely to be stressed due to emerging beneficial  
156 or other uses, ecological conditions or other factors  
157 requiring the development of a strategy for management  
158 of these water resources. The report shall include an  
159 analysis of the costs and benefits upon persons potentially  
160 impacted by the implementation of a water quantity  
161 management strategy.

162 (m) The secretary may propose rules pursuant to article  
163 three, chapter twenty-nine-a of this code as necessary to  
164 implement the survey and registration requirements of this  
165 article.

166 (n) The secretary is authorized to enter into cooperative  
167 agreements with the United States geological survey to  
168 obtain federal matching funds, conduct research and  
169 analyze survey and registration data and other agreements  
170 as may be necessary to carry out his or her duties under  
171 this article.

**§22-25-4. Confidentiality.**

1 (a) Information required to be submitted by a person as  
2 part of the water withdrawal survey and registration that  
3 may be a trade secret, contain protected information  
4 relating to homeland security or be subject to another  
5 exemption provided by the state freedom of information  
6 act may be deemed confidential. Each such document  
7 shall be identified by that person as confidential informa-

8 tion. The person claiming confidentiality shall provide  
9 written justification to the secretary at the time the  
10 information is submitted stating the reasons for confiden-  
11 tiality and why the information should not be released or  
12 made public. The secretary has the discretion to approve  
13 or deny requests for confidentiality as prescribed by this  
14 section.

15 (b) In addition to records or documents that may be  
16 considered confidential under article one, chapter twenty-  
17 nine-b of this code, confidential information means  
18 records, reports or information, or a particular portion  
19 thereof, that if made public would:

20 (1) Divulge production or sales figures or methods,  
21 processes or production unique to the submitting person;

22 (2) Otherwise tend to adversely affect the competitive  
23 position of a person by revealing trade secrets, including  
24 intellectual property rights; or

25 (3) Present a threat to the safety and security of any  
26 water supply, including information concerning water  
27 supply vulnerability assessments.

28 (c) Information designated as confidential and the  
29 written justification shall be maintained in a file separate  
30 from the general records related to the person.

31 (d) Information designated as confidential may be  
32 released when the information is contained in a report in  
33 which the identity of the person has been removed and the  
34 confidential information is aggregated by hydrologic unit  
35 or region.

36 (e) Information designated as confidential may be  
37 released to governmental entities, their employees and  
38 agents when compiling and analyzing survey and registra-  
39 tion information and as may be necessary to develop the  
40 legislative report required by this section or to develop  
41 water resources plans. Any governmental entity or person

42 receiving information designated confidential shall protect  
43 the information as confidential.

44 (f) Upon receipt of a request for information that has  
45 been designated confidential and prior to making a  
46 determination to grant or deny the request, the secretary  
47 shall notify the person claiming confidentiality of the  
48 request and may allow the person an opportunity to  
49 respond to the request in writing within five days.

50 (g) All requests to inspect or copy documents shall state  
51 with reasonable specificity the documents or type of  
52 documents sought to be inspected or copied. Within ten  
53 business days of the receipt of a request, the secretary  
54 shall: (1) Advise the person making the request in writing  
55 of the time and place where the person may inspect and  
56 copy the documents which, if the request addresses  
57 information claimed as confidential, may not be sooner  
58 than twenty days following the date of the determination  
59 to disclose, unless an earlier disclosure date is agreed to by  
60 the person claiming confidentiality; or (2) deny the re-  
61 quest, stating in writing the reasons for denial. If the  
62 request addresses information claimed as confidential,  
63 then notice of the action taken pursuant to this subsection  
64 shall also be provided to the person asserting the claim of  
65 confidentiality.

66 (h) Any person adversely affected by a determination  
67 regarding confidential information under this article may  
68 appeal the determination to the appropriate circuit court  
69 pursuant to the provisions of article five, chapter twenty-  
70 nine-a of this code. The filing of a timely notice of appeal  
71 shall stay any determination to disclose confidential  
72 information pending a final decision on appeal. The scope  
73 of review is limited to the question of whether the portion  
74 of the records, reports, data or other information sought to  
75 be deemed confidential, inspected or copied is entitled to  
76 be treated as confidential under this section. The secretary  
77 shall afford evidentiary protection in appeals as necessary  
78 to protect the confidentiality of the information at issue,

79 including the use of in camera proceedings and the sealing  
80 of records when appropriate.

**§22-25-5. Joint legislative oversight commission on state water resources.**

1 (a) The president of the Senate and the speaker of the  
2 House of Delegates shall each designate five members of  
3 their respective houses, at least one of whom shall be a  
4 member of the minority party, to serve on a joint legisla-  
5 tive oversight commission charged with immediate and  
6 ongoing oversight of the water resources survey and  
7 registration. This commission shall be known as the "Joint  
8 Legislative Oversight Commission on State Water Re-  
9 sources" and shall regularly investigate and monitor all  
10 matters relating to the water resources survey and the  
11 need for a water resources strategy and policy.

12 (b) The expenses of the commission, including the cost of  
13 conducting the survey and monitoring any subsequent  
14 strategy and those incurred in the employment of legal,  
15 technical, investigative, clerical, stenographic, advisory  
16 and other personnel, are to be approved by the joint  
17 committee on government and finance and paid from  
18 legislative appropriations.

19 (c) The secretary shall report, at a minimum of quarterly,  
20 in sufficient detail for the commission to monitor the  
21 water resources survey and to develop recommendations  
22 resulting from the survey. The secretary shall submit an  
23 annual report to the commission by the thirty-first day of  
24 December each year. The secretary shall also file a final  
25 report on the water resources survey no later than the  
26 thirty-first day of December, two thousand six.

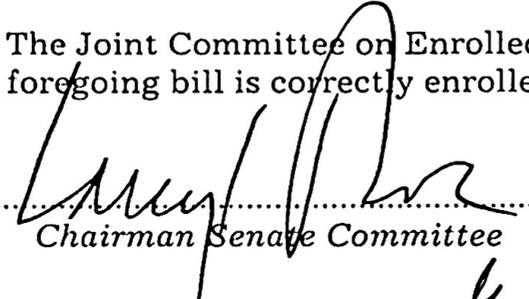
**§22-25-6. Mandatory survey and registration compliance.**

1 (a) The water resources survey and subsequent registry  
2 will provide critical information for protection of the  
3 state's water resources and, thus, mandatory compliance  
4 with the survey and registry is necessary.

5 (b) Any person who fails to complete the survey or  
6 register, provides false or misleading information on the  
7 survey or registration, fails to provide other information as  
8 required by this article may be subject to a civil adminis-  
9 trative penalty not to exceed five thousand dollars to be  
10 collected by the secretary consistent with the secretary's  
11 authority pursuant to this chapter. Every thirty days after  
12 the initial imposition of the civil administrative penalty,  
13 another penalty may be assessed if the information is not  
14 provided. The secretary shall provide written notice of  
15 failure to comply with this section thirty days prior to  
16 assessing the first administrative penalty.

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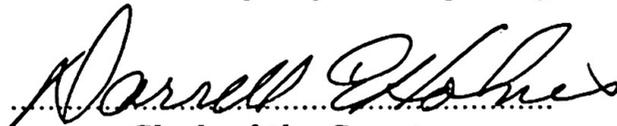
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

  
.....  
Chairman Senate Committee

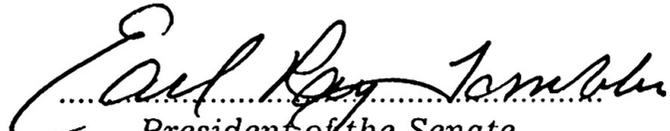
  
.....  
Chairman House Committee

Originated in the Senate.

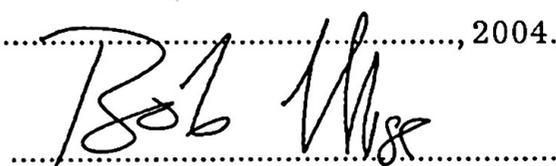
In effect ninety days from passage.

  
.....  
Clerk of the Senate

  
.....  
Clerk of the House of Delegates

  
.....  
President of the Senate

  
.....  
Speaker House of Delegates

The within is approved this the ten  
Day of April, 2004.  
  
.....  
Governor

PRESENTED TO THE  
GOVERNOR

DATE 3/26/04  
TIME 3:10 pm