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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,
BY REQUEST OF THE EXECUTIVE)

[Passed March 13, 2004; in effect ninety days from passage.]

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.

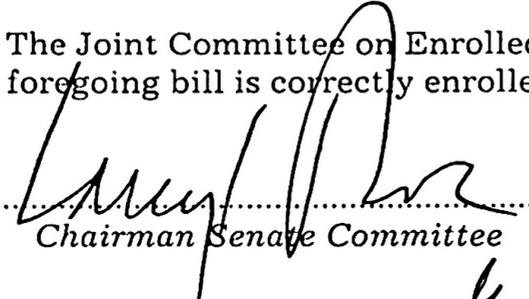
§22-25-6. Mandatory survey and registration compliance.

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.

Enr. Com. Sub. for S. B. No. 163] 14

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


.....
Chairman Senate Committee

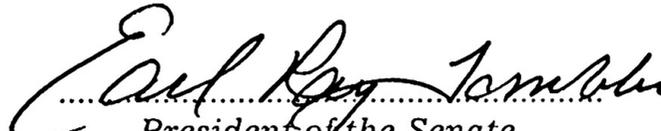

.....
Chairman House Committee

Originated in the Senate.

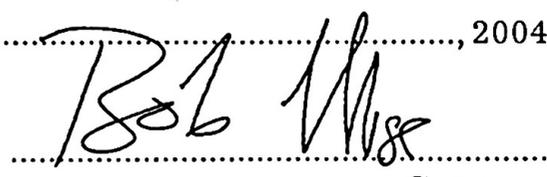
In effect ninety days from passage.


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Clerk of the Senate


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Clerk of the House of Delegates


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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