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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE
Regular Session, 2005

ENROLLED

SENATE BILL NO. 748

(By Senator Kessler, et al)

PASSED April 9, 2005

In Effect 90 days from Passage

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Senate Bill No. 748

(BY SENATORS KESSLER, FANNING, JENKINS, MINARD, CARUTH,
LANHAM, MCKENZIE AND WEEKS)

[Passed April 9, 2005; in effect ninety days from passage.]

AN ACT to amend and reenact §22-11-7a of the Code of West Virginia, 1931, as amended, relating to mitigation; deleting the mitigation requirement for isolated waters; and requiring the Director to provide credit for mitigation required as a component of the permit issuable by the U. S. Army Corps of Engineers pursuant to 33 U. S. C. §1344 to the extent that it satisfies state requirements.

Be it enacted by the Legislature of West Virginia:

That §22-11-7a of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 11. WATER POLLUTION CONTROL ACT.

§22-11-7a. Certification agreements; required provisions; effective date.

- 1 (a) Any applicant for the water quality certification that
- 2 seeks certification of activities covered by the United

3 States army corps of engineers permits issued in accor-
4 dance with 33 U. S. C. §1344 and 33 C. F. R. Parts 323
5 or 330 for use at or in conjunction with a surface coal
6 mining operation as defined in section three, article three
7 of this chapter, certification may be issued subject to the
8 following conditions:

9 (1) If the applicant's surface coal mining operation will
10 not impact waters of the state designated as national
11 resource waters and streams where trout naturally repro-
12 duce and will not impact wetlands of the state in a manner
13 inconsistent with all applicable state or federal standards
14 as the case may be, as required by the federal Clean Water
15 Act, and if the watershed above the toe of the farthest
16 downstream permanent structure authorized pursuant to
17 the United States army corps of engineers permits issued
18 in accordance with 33 U. S. C. §1344 and 33 C. F. R.
19 Parts 323 or 330 is less than two hundred fifty acres, then
20 the director may issue a water quality certification
21 pursuant to the requirements of this section. If the
22 watershed above the toe of the farthest downstream
23 permanent structure impacted is equal to or greater than
24 two hundred fifty acres, the director shall require that
25 mitigation be undertaken. Additionally, the director may
26 require mitigation for temporary impacts to waters of the
27 state as specified in subdivision (2) of this subsection.

28 (2) If the watershed above the toe of the farthest down-
29 stream permanent structure authorized pursuant to the
30 United States army corps of engineers permits issued in
31 accordance with 33 U. S. C. §1344 and 33 C. F. R. Parts
32 323 or 330 is greater than or equal to two hundred fifty
33 acres and all other necessary requirements are met consis-
34 tent with this section, the director shall further condition
35 a water quality certification on a requirement that the
36 applicant mitigate the expected water quality impacts
37 under the following conditions:

38 (A) The water quality certification may require mitiga-
39 tion at a ratio appropriate to the type of waters impacted,

40 consistent with state or federal standards as required by
41 the federal Clean Water Act, for the types and locations of
42 waters impacted;

43 (B) The Director may accept mitigation on the permitted
44 area, mitigation off the permitted area, mitigation banking
45 of waters of the state, or any combination thereof, or any
46 other mitigation measure acceptable to the Director; and

47 (C) The Director shall provide credit for any mitigation
48 that is a required component of the permit issued by the
49 United States Army Corps of Engineers pursuant to 33 U.
50 S. C. §1344 to the extent that it satisfies required mitiga-
51 tion pursuant to this section.

52 (D) Upon completion of the work required by an agree-
53 ment to conduct operations authorized by this subsection
54 the surface coal mining operation shall obtain a certifica-
55 tion from a registered professional engineer that all
56 mitigation work specified in the agreement has been
57 completed in accordance with the conditions of the water
58 quality certification. The director shall promptly review
59 the certification and provide to the surface coal mining
60 operation with notice that all mitigation work has been
61 successfully completed, or that further mitigation work is
62 necessary to meet the conditions imposed by the water
63 quality certification. The mitigation amount may not
64 exceed two hundred thousand dollars per acre of stream
65 disturbed above the toe of the farthest downstream
66 permanent structure. Those moneys shall be deposited in
67 the stream restoration fund under the jurisdiction of the
68 Division of Environmental Protection and any expendi-
69 tures from this fund after the thirtieth day of June, one
70 thousand nine hundred ninety-eight, shall not be autho-
71 rized from collections but shall only be authorized by
72 appropriation by the Legislature. Additionally, the
73 expenditures are only authorized in those counties where
74 the activity leading to the mitigation occurred or in those
75 counties adjacent to the counties where the activity
76 leading to the mitigation occurred. The Director shall by

77 the thirty-first day of December of each year provide a
78 report to the Joint Committee on Government and Finance
79 on receipts and expenditures from the stream restoration
80 fund, the number of acreage reclaimed by the Division
81 through the use of these funds and the effectiveness of
82 achieving stream restoration through the payment of the
83 mitigation amounts into the fund in lieu of reclamation by
84 the certificate holder.

85 (3) The Director shall confer with representatives of the
86 surface coal mining industry and representatives of
87 environmental organizations with an interest in water
88 quality in developing a manual of approval options for
89 mitigation on permitted areas, mitigation off permitted
90 areas and mitigation involving banking of waters of the
91 state.

92 (4) The proposed surface coal mining operation shall
93 comply with all applicable state and federal laws, rules
94 and regulations.

95 (5) The Director shall propose rules for legislative
96 approval in accordance with article three, chapter twenty-
97 nine-a of this code, for the purpose of implementing the
98 provisions of this section which rules shall include, but not
99 be limited to, the following:

100 (A) Establishing all necessary operational and perfor-
101 mance requirements for an operator undertaking activities
102 covered by this section;

103 (B) Modifying the provisions of this section, when
104 necessary and appropriate to bring the provisions of this
105 section into compliance with state or federal law or
106 regulation; and

107 (C) Establishing the specific operational requirements
108 for mining operations consistent with this section appro-
109 priate to protect the waters of this state during and
110 following mining operations.

111 (b) The Joint Committee on Government and Finance
112 may undertake or facilitate a study of the impact of
113 mountaintop mining and valley fills upon the state of West
114 Virginia.

115 (1) To facilitate the study, the Joint Committee on
116 Government and Finance is further authorized to coordi-
117 nate with and seek funding from appropriate federal
118 agencies to facilitate the study including, but not limited
119 to: The Environmental Protection Agency, Army Corps of
120 Engineers, Office of Surface Mining and the Fish and
121 Wildlife Service.

122 (2) In order to facilitate the research, the Joint Commit-
123 tee on Government and Finance shall appoint a council to
124 coordinate and direct the research. The composition of the
125 council shall be determined by the Joint Committee, but
126 shall include representatives from the various interested
127 parties as determined solely by the Joint Committee.

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

Sandy White
.....
Chairman Senate Committee

W. Richard Burns
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Darrell G. Holmes
.....
Clerk of the Senate

Bruce M. Bow
.....
Clerk of the House of Delegates

Earl Ray Tomblin
.....
President of the Senate

[Signature]
.....
Speaker House of Delegates

The within *is approved* this the *21st*
Day of *April*, 2005.

[Signature]
.....
Governor

PRESENTED TO THE
GOVERNOR

APR 15 2005

Time 4:20p