

Senate Bill No. 626

(By Senators Unger and Wells)

[Introduced February 17, 2014; referred to the Committee on
Natural Resources; and then to the Committee on Finance.]

10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new article, designated §5A-12-1, §5A-12-2,
12 §5A-12-3, §5A-12-4, §5A-12-5, §5A-12-6, §5A-12-7, §5A-12-8,
13 §5A-12-9, §5A-12-10, §5A-12-11, §5A-12-12 and §5A-12-13, all
14 relating to the Elk River Spill Victims' Compensation Act;
15 creating the Office of Elk River Spill Victims' Compensation
16 Fund within the Department of Administration; defining terms;
17 authorizing the director to investigate the spill and
18 determine potentially responsible parties; establishing
19 criteria for eligibility; providing for due process; providing
20 for exclusivity of remedies; providing for subrogation on
21 behalf of the state; authorizing a study to determine the
22 feasibility of a permanent fund and providing program will be
23 effective when adequate funding is available.

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

2 That the Code of West Virginia, 1931, as amended, be amended
3 by adding thereto a new article, designated §5A-12-1, §5A-12-2,
4 §5A-12-3, §5A-12-4, §5A-12-5, §5A-12-6, §5A-12-7, §5A-12-8, §5A-12-
5 9, §5A-12-10, §5A-12-11, §5A-12-12 and §5A-12-13, all to read as
6 follows:

7 **ARTICLE 12. ELK RIVER SPILL VICTIMS' COMPENSATION ACT OF 2014.**

8 **§5A-12-1. Short title.**

9 This article may be cited as the "Elk River Spill Victims'
10 Compensation Act of 2014".

11 **§5A-12-2. Creation of Office of Elk River Spill Victims'**
12 **Compensation Act of 2014.**

13 There is hereby created within the Department of
14 Administration the "Office of Elk River Spill Victims'
15 Compensation". The director of the Department of Administration
16 shall be the fund coordinator and chief operating officer. The
17 director shall:

18 (a) Administer the compensation program established under
19 this article;

20 (b) Propose for promulgation of procedural and substantive
21 rules in accordance with the provisions of article three, chapter
22 twenty-nine-a of this code for the administration of this article;
23 and

1 (c) Employ and supervise hearing officers and other
2 administrative personnel to perform the duties of the director
3 under this article.

4 **§5A-12-3. Definitions.**

5 (a) "Claimant" means an individual or entity filing a claim
6 for compensation under this article.

7 (b) "Collateral source" means all collateral sources,
8 including insurance, pension funds, death benefit programs and
9 payments received or claimed from Responsible Parties, Federal,
10 State or local governments related to and resulting from the
11 chemical spills to the Elk River from the Freedom Industries
12 facility on, around and following January 9, 2014

13 (c) "Economic loss" means any pecuniary loss resulting from
14 harm (including the loss of earnings or other benefits related to
15 employment), medical expense loss, replacement services loss, loss
16 due to physical injury or death or business interruption or loss of
17 business or employment opportunities to the extent recovery for
18 such loss is not prohibited under applicable state law.

19 (d) "Noneconomic losses" means losses for physical and
20 emotional pain, suffering, inconvenience, physical impairment,
21 mental anguish, disfigurement, loss of enjoyment of life, loss of
22 society and companionship, loss of consortium or domestic service,
23 hedonic damages, injury to reputation and all other nonpecuniary

1 losses of any kind or nature, any physical injury, long or short
2 term health effects.

3 **§5A-12-4. Purpose.**

4 The purpose of this article is to provide compensation to any
5 individual or entity which suffered economic or noneconomic losses
6 as a result of the chemical spills to the Elk River from the
7 Freedom Industries facility on, around and following January 9,
8 2014.

9 **§5A-12-5. Designation of potentially responsible parties.**

10 Within six months following the enactment of this article, the
11 director shall conduct a preliminary investigation and shall
12 designate, as "Potentially Responsible Parties", the persons who
13 appear to have contributed to the losses addressed by this article.
14 These may include, but are not limited to:

15 (1) Freedom Industries and its principals, predecessors and
16 successors, and the principals of its predecessors and successors;

17 (2) The manufacturer of the chemicals which were spilled from
18 the Freedom Industries facility on and following January 9, 2014
19 and;

20 (3) American Water Company and its affiliates.

21 **§5A-12-6. Eligibility for compensation.**

22 (a) A claimant may file a claim for compensation under this
23 article on forms prescribed by the director. The director shall

1 ensure that the form may be filed electronically, as well as
2 submitted by United States mail.

3 (b) The claim form shall:

4 (1) Require an explanation or statement of the factual basis
5 for eligibility for compensation and the amount of compensation
6 sought;

7 (2) Information regarding collateral sources of compensation
8 the claimant has received or is entitled to receive as a result of
9 such chemical spill and;

10 (3) Other information, specified by the director, necessary to
11 adjudicate the claim.

12 (c) No claim may be filed under this article more than two
13 years after the effective date of rules promulgation required by
14 this article.

15 (d) The director shall review a claim submitted under this
16 article and determine:

17 (1) Whether the claimant is an eligible individual or entity
18 and not a responsible party;

19 (2) The extent of the harm to the claimant, including any
20 economic and noneconomic losses; and

21 (3) The amount of compensation to which the claimant is
22 entitled based on the harm to the claimant, the facts of the claim
23 and the individual circumstances of the claimant.

1 (e) The director may not consider negligence or any other
2 theory of liability but shall compensate claimants for economic and
3 noneconomic losses actually sustained, without regard to common law
4 defenses or limitations.

5 (f) The director shall complete a review and make a
6 determination not later than one hundred twenty days after the
7 receipt of a completed claim form. The director shall provide
8 written notice of his or her decision to the claimant. The
9 decision of the director is final and not subject to judicial
10 review.

11 (g) The claimant has:

12 (1) The right to be represented by an attorney;

13 (2) The right to present evidence, including the presentation
14 of witnesses and documents; and

15 (3) Any other due process rights established in procedural
16 rules promulgated by the director.

17 (h) The director shall reduce the amount of compensation to a
18 claimant by the amount of the collateral source compensation the
19 claimant has received based on the same damages.

20 (I) Not more than one claim may be submitted under this
21 article by or on behalf of an individual or entity.

22 **§5A-12-7. Limitation on civil action.**

23 (a) Upon the receipt and acceptance of payment for a claim

1 under this article, the claimant waives the right to file a civil
2 action, or to be a party to an action, in any federal or state
3 court for damages sustained as a result of the chemical spills to
4 the Elk River from the Freedom Industries facility on, around and
5 following January 9, 2014. The preceding sentence does not apply to
6 a civil action to recover collateral source obligations.

7 (b) In the case of an individual who is a party to a civil
8 action described in subsection (a) of this section, that individual
9 may not submit a claim under this article unless that individual
10 withdraws from the civil action prior to filing a claim under this
11 article.

12 **§5A-12-8. Payments to eligible individuals.**

13 Subject to the availability of funding for this purpose, not
14 later than twenty days after the date on which a determination is
15 made by the director regarding the amount of compensation due a
16 claimant under this article, the director shall authorize payment
17 to the claimant of the amount determined with respect to the
18 claimant.

19 **§5A-12-9. Creation of fund.**

20 (a) There is hereby created in the State Treasury a special
21 fund to be known as the "Elk River Spill Victims' Compensation
22 Fund". Expenditures from the fund are for compensation to
23 individuals and entities found to be eligible under the

1 requirements of this article and necessary administrative expenses.
2 Not more than one percent of collections may be utilized for
3 administrative expenses. Expenditures are not authorized from
4 collections but are to be made only in accordance with
5 appropriation by the Legislature and in accordance with the
6 provisions of article three, chapter twelve of this code and upon
7 fulfillment of the provisions of article two, chapter eleven-b of
8 the code: *Provided*, That for fiscal years prior to the thirtieth
9 day of June, 2016 expenditures are authorized from collections
10 rather than pursuant to appropriation by the Legislature.

11 (b) The Governor and the director shall consult with
12 appropriate agencies of the United States Government regarding an
13 appropriate United States Government contribution to the director
14 and are authorized to accept such amounts subject to such
15 conditions as may be required.

16 (c) The director shall consult with appropriate agencies of
17 state and federal governments with a view towards assuring
18 effective and successful prosecution of responsible parties and is
19 authorized to accept any proceeds arising out of such prosecutions
20 and utilize them in furtherance of the purposes of this article.

21 (3) The director shall seek reimbursement from responsible
22 parties for any and all amounts paid to claimants under this
23 article, and may accept advance contributions from responsible

1 parties for this purpose. Such advance contributions may be
2 considered as factors mitigating the liability of the contributing
3 party.

4 (d) The director may accept such amounts as may be contributed
5 by individuals, business concerns or other entities to carry out
6 this article.

7 **§5A-12-10. Rulemaking.**

8 Not later than ninety days after the effective date of the
9 enactment of this article, the director shall propose for
10 promulgation pursuant to article three, chapter twenty-nine-a of
11 this code rules to effectuate the purposes of this article,
12 including, :

- 13 (1) Forms to be used in submitting claims under this article;
14 (2) The information to be included in such forms;
15 (3) Procedures for hearing and the presentation of evidence;
16 (4) Procedures to assist an individual in filing and pursuing
17 claims under this article.

18 **§5A-12-11. Right of subrogation and enforcement cooperation.**

19 The director on behalf of the State of West Virginia has the
20 right of subrogation with respect to any claim paid by the director
21 under this article.

22 **§5A-12-12. Permanent Compensation Fund.**

23 The Governor shall commission a study to determine the

1 feasibility and potential effectiveness of a state mandated fund or
2 insurance program to assure the availability of adequate financial
3 resources to compensate victims of any similar future event.

4 **§5A-12-13. Effective date.**

5 This article shall be effective on enactment: *Provided*, That
6 the compensation program provided for herein may not come into
7 effect until the director determines that adequate funding is
8 available to support the program.

NOTE: The purpose of this bill is to establish the Elk River Spill Victims' Compensation Fund and Act of 2014. The as yet to be fully determined impact and economic loss caused to a nine-county region of West Virginia will be assessed and victims will be compensated pursuant to this article. The director will determine the responsible parties and seek reimbursement from them. The Elk River Spill Victims' Compensation fund can accept contributions from responsible parties, gifts and donations from individuals, businesses, etc., and the federal government. Claimants cannot seek damages through the Elk River Spill Victims' Compensation fund and civil lawsuits except from collateral sources. The director, on behalf of the state, has the right of subrogation.

This article is new; therefore, strike-throughs and underscoring have been omitted.