

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Introduced

Senate Bill 246

BY SENATORS BOSO, PLYMALE, CLINE AND RUCKER

[Introduced February 10, 2017; referred
to the Committee on the Judiciary]

1 A BILL to amend and reenact §22-11-7b and §22-11-11 of the Code of West Virginia, 1931, as
 2 amended, all relating to the implementation of water quality standards for the protection
 3 of drinking water in permits; and providing draft permits to applicants prior to public notice.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 11. WATER POLLUTION CONTROL ACT.

**§22-11-7b. Water quality standards; implementation of antidegradation procedures;
 procedure to determine compliance with the biologic component of the narrative
 water quality standard.**

1 (a) All authority to promulgate rules and implement water quality standards is vested in
 2 the Secretary of the Department of Environmental Protection.

3 (b) All meetings with the secretary or any employee of the department and any interested
 4 party which are convened for the purpose of making a decision or deliberating toward a decision
 5 as to the form and substance of the rule governing water quality standards or variances thereto
 6 shall be held in accordance with the provisions of article nine-a, chapter six of this code. When
 7 the secretary is considering the form and substance of the rules governing water quality
 8 standards, the following are not meetings pursuant to article nine-a, chapter six of this code: (i)
 9 Consultations between the department's employees or its consultants, contractors or agents; (ii)
 10 consultations with other state or federal agencies and the department's employees or its
 11 consultants, contractors or agents; or (iii) consultations between the secretary, the department's
 12 employees or its consultants, contractors or agents with any interested party for the purpose of
 13 collecting facts and explaining state and federal requirements relating to a site specific change or
 14 variance.

15 (c) In order to carry out the purposes of this chapter, the secretary shall promulgate
 16 legislative rules in accordance with the provisions of article three, chapter twenty-nine-a of this

17 code setting standards of water quality applicable to both the surface waters and ground waters
18 of this state. Standards of quality with respect to surface waters shall protect the public health and
19 welfare, wildlife, fish and aquatic life and the present and prospective future uses of the water for
20 domestic, agricultural, industrial, recreational, scenic and other legitimate beneficial uses thereof.
21 The water quality standards of the secretary may not specify the design of equipment, type of
22 construction or particular method which a person shall use to reduce the discharge of a pollutant.
23 For implementing human health criteria for the protection of drinking water, permit limits shall be
24 calculated using the harmonic mean flow, and the secretary may determine the point of
25 compliance for a permittee's discharge at the downstream boundary of a mixing zone determined
26 without regard to limitations on spatial area or overlapping discharges that extends to, but not
27 beyond, a point one-half mile upstream of a public water supply, unless the public water supply
28 agrees in writing to an extension of the mixing zone to a point no less than five hundred yards
29 upstream of its intake. The secretary may propose emergency revisions to its water quality
30 standards to implement the design flows and mixing zone requirements for implementation of
31 human health criteria for the protection of drinking water.

32 (d) The secretary shall establish the antidegradation implementation procedures as
33 required by 40 C. F. R. 131.12(a) which apply to regulated activities that have the potential to
34 affect water quality. The secretary shall propose for legislative approval, pursuant to article three,
35 chapter twenty-nine-a of the code, legislative rules to establish implementation procedures which
36 include specifics of the review depending upon the existing uses of the water body segment that
37 would be affected, the level of protection or "tier" assigned to the applicable water body segment,
38 the nature of the activity and the extent to which existing water quality would be degraded. Any
39 final classification determination of a water as a Tier 2.5 water (Water of Special Concern) does
40 not become effective until that determination is approved by the Legislature through the legislative
41 rule-making process as provided in article three, chapter twenty-nine-a of the code.

42 (e) All remaining variances shall be applied for and considered by the secretary and any

43 variance granted shall be consistent with 33 U. S. C. Section 1311(p) of the Federal Water Control
44 Act. At a minimum, when considering an application for a remining variance the secretary shall
45 consider the data and information submitted by the applicant for the variance; and comments
46 received at a public comment period and public hearing. The secretary may not grant a variance
47 without requiring the applicant to improve the instream water quality as much as is reasonably
48 possible by applying best available technology economically achievable using best professional
49 judgment. Any such requirement will be included as a permit condition. The secretary may not
50 grant a variance without a demonstration by the applicant that the coal remining operation will
51 result in the potential for improved instream water quality as a result of the remining operation.
52 The secretary may not grant a variance where he or she determines that degradation of the
53 instream water quality will result from the remining operation.

54 (f) The secretary shall propose rules measuring compliance with the biologic component
55 of West Virginia's narrative water quality standard requires evaluation of the holistic health of the
56 aquatic ecosystem and a determination that the stream: (i) Supports a balanced aquatic
57 community that is diverse in species composition; (ii) contains appropriate trophic levels of fish,
58 in streams that have flows sufficient to support fish populations; and (iii) the aquatic community is
59 composed of benthic invertebrate assemblages sufficient to perform the biological functions
60 necessary to support fish communities within the assessed reach, or, if the assessed reach has
61 insufficient flows to support a fish community, in those downstream reaches where fish are
62 present. The secretary shall propose rules for legislative approval in accordance with the
63 provisions of article three, chapter twenty-nine-a of this code that implement the provisions of this
64 subsection. Rules promulgated pursuant to this subsection may not establish measurements for
65 biologic components of West Virginia's narrative water quality standards that would establish
66 standards less protective than requirements that exist at the time of enactment of the
67 amendments to this subsection by the Legislature during the 2012 regular session.

§22-11-11. Procedure concerning permits required under article; transfer of permits; prior

permits.

1 (a) The chief or his or her duly authorized representatives shall conduct such investigation
2 as is deemed necessary and proper in order to determine whether any such application should
3 be granted or denied. In making such investigation and determination as to any application
4 pertaining solely to sewage, the chief shall consult with the director of the office of environmental
5 health services of the state bureau of public health, and in making such investigation and
6 determination as to any application pertaining to any activity specified in subdivision (7),
7 subsection (b), section eight of this article, the chief shall consult with the director of the state
8 geological and economic survey and the chief of the office of oil and gas of the division, and all
9 such persons shall cooperate with the chief and assist him or her in carrying out the duties and
10 responsibilities imposed upon him or her under the provisions of this article and the rules of the
11 director and board; such cooperation shall include, but not be limited to, a written recommendation
12 approving or disapproving the granting of the permit and the reason or reasons for such
13 recommendation, which recommendation and the reason or reasons therefor shall be submitted
14 to the chief within the specified time period prescribed by rules of the director.

15 (b) The division's permit shall be issued upon such reasonable terms and conditions as
16 the chief may direct if (1) the application, together with all supporting information and data and
17 other evidence, establishes that any and all discharges or releases, escapes, deposits and
18 disposition of treated or untreated sewage, industrial wastes or other wastes, or the effluent
19 therefrom, resulting from the activity or activities for which the application for a permit was made
20 will not cause pollution of the waters of this state or violate any effluent limitations or any rules of
21 the board or director: Provided, That the chief may issue a permit whenever in his or her judgment
22 the water quality standards of the state may be best protected by the institution of a program of
23 phased pollution abatement which under the terms of the permit may temporarily allow a limited
24 degree of pollution of the waters of the state; and (2) in cases wherein it is required, such applicant
25 shall include the name and address of the responsible agent as set forth in subsection (e), section

26 six, article six of this chapter.

27 (c) Each permit issued under this article shall have a fixed term not to exceed five years:
28 Provided, That when the applicant, in accordance with agency rules, has made a timely and
29 complete application for permit reissuance, the permit term may be extended by the chief, at his
30 or her discretion. An extension may be granted for a period not to exceed twelve months beyond
31 its expiration date. Successive extensions may be granted for periods not to exceed twelve
32 months if the chief determines additional time is necessary in order to process the application for
33 permit reissuance. Upon expiration of a permit, a new permit may be issued by the chief upon
34 condition that the discharges or releases, escapes, deposits and disposition thereunder meet or
35 will meet all applicable state and federal water quality standards, effluent limitations and all other
36 requirements of this article.

37 (d) An application for a permit incident to remedial action in accordance with the provisions
38 of section sixteen of this article shall be processed and decided as any other application for a
39 permit required under the provisions of section eight of this article.

40 (e) A complete application for any permit shall be acted upon by the chief, and the
41 division's permit delivered or mailed, or a copy of any order of the chief denying any such
42 application delivered or mailed to the applicant by the chief, within a reasonable time period as
43 prescribed by rules of the director: Provided, That for permits to be issued in accordance with the
44 National Pollutant Discharge Elimination System, the secretary shall ensure that the draft permit
45 and fact sheet are available to the applicant for review at least thirty days before any public notice
46 and comment period and, if requested by the applicant, the secretary shall meet and confer with
47 the applicant regarding the draft permit and fact sheet prior to public notice.

48 (f) When it is established that an application for a permit should be denied, the chief shall
49 make and enter an order to that effect, which order shall specify the reasons for such denial, and
50 shall cause a copy of such order to be served on the applicant by registered or certified mail. The
51 chief shall also cause a notice to be served with a copy of such order, which notice shall advise

52 the applicant of the right to appeal to the board by filing a notice of appeal on the form prescribed
53 by the board for such purpose, with the board, in accordance with the provisions of, and within
54 the time specified in, section seven, article one, chapter twenty-two-b of this code. However, an
55 applicant may alter the plans and specifications for the proposed activity and submit a new
56 application for any such permit, in which event the procedure hereinbefore outlined with respect
57 to an original application shall apply.

58 (g) A permit is transferable to another person upon proper notification to the chief and in
59 accordance with applicable rules. Such transfer does not become effective until it is reflected in
60 the records of the office of water resources.

61 (h) All permits for the discharge of sewage, industrial wastes or other wastes into any
62 waters of the state issued by the water resources board prior to July one, one thousand nine
63 hundred sixty-four, and all permits heretofore issued under the provisions of former article five-a,
64 chapter twenty of this code, and which have not been heretofore revoked, are subject to review,
65 revocation, suspension, modification and reissuance in accordance with the terms and conditions
66 of this article and the rules promulgated thereunder. Any order of revocation, suspension or
67 modification made and entered pursuant to this subsection shall be upon at least twenty days'
68 notice and shall specify the reasons for such revocation, suspension or modification and the chief
69 shall cause a copy of such order, together with a copy of a notice of the right to appeal to the
70 board as provided for in section twelve of this article, to be served upon the permit holder as
71 specified in said section twelve.

72 (i) The secretary may not require a permit that is issued, in whole or in part, under the
73 auspices of the National Pollutant Discharge Elimination System to be modified in order to include
74 or amend a plan that is required by state law but is not required by the National Pollutant
75 Discharge Elimination System. Such plans, which include, but are not limited to, groundwater
76 protection plans, storm water pollution prevention plans and spill prevention and response plans,
77 remain enforceable under their respective authorizing statutes, but amendments to such plans

78 are not cause for modification of a permit.

NOTE: The purpose of this bill is to create a more effective permit process that encourages coordination between applicants and the state, that specifies how mixing zones are determined for water quality criteria that are developed for protection of public water supplies, and clarifies that amendment of certain plans required of permittees are not cause for modifying a permit.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.