

# **Appendix A**

## **Water Resources Protection Act**

**ENROLLED**

## COMMITTEE SUBSTITUTE

FOR

**Senate Bill No. 163**

(By Senators Tomblin, Mr. President, and Sprouse,

By Request of the Executive)

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

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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.**

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

(b) Legislative findings:

(1) The West Virginia Legislature finds that it is the public policy of the state of West Virginia to protect and conserve the water resources for the state and to provide for the public welfare. The state's water resources are vital natural resources of the state that are essential to maintain, preserve and promote quality of life and economic vitality of the state.

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

**§22-25-2. Definitions.**

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

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

(b) "Consumptive withdrawal" means any withdrawal of water which returns less water to the water body than is withdrawn.

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

(d) "Interbasin transfer" means the permanent removal of water from the watershed from which it is withdrawn.

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

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

(g) "Nonconsumptive withdrawal" means any withdrawal of water which is not a consumptive withdrawal as defined in this section.

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

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

(j) "Watershed" means a hydrologic unit utilized by the United States department of interior's geological survey, adopted in 1974, as a framework for detailed water and related land-resource planning, denoted by an eight digit hydrologic unit code, and by which West Virginia is, as

of the effective date of the act, divided into thirty-two separate hydrologic units.

(k) "Withdrawal" means the removal or capture of water from a water resource of the state regardless of whether it is consumptive or nonconsumptive: *Provided*, That water encountered during coal, oil, gas or other mineral extraction and diverted, but not used for any purpose and not a factor in low flow conditions for any surface water or 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.**

(a) The waters of the state of West Virginia are hereby claimed as valuable public natural resources held by the state for the use and benefit of its citizens. The state shall manage the quantity of its waters effectively for present and future use and enjoyment and for the protection of the environment. Therefore, it is necessary for the state to determine the nature and extent of its water resources, the quantity of water being withdrawn or otherwise used and the nature of the withdrawals or other uses: *Provided*, That no provisions of this article may be construed to amend or limit any other rights and remedies created by statute or common law in existence on the date of the enactment of this article .

(b) The secretary shall conduct a water resources survey of consumptive and nonconsumptive surface water and groundwater withdrawals in this state. The secretary shall determine the form and format of the information submitted, including the use of electronic submissions. The survey shall collect information covering the years two thousand three, two thousand four and two thousand five. The secretary shall establish a statewide registration program to monitor large quantity users of water resources of this state beginning in two thousand six.

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

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

(e) All state agencies that have a regulatory, research or other function relating to water resources, including, but not limited to, the state geological and economic survey , the division of natural resources, the public service commission, the bureau for public health, the commissioner of the department of agriculture, the office of emergency services, Marshall university and West Virginia university may enter into interagency agreements with the secretary and shall cooperate by: (i) Providing information relating to the water resources of the state; and (ii) providing any necessary assistance to the secretary in effectuating the purposes of this article. The secretary shall determine the form and format of the information submitted by these agencies.

(f) Persons required to participate in the survey and registration shall provide any reasonably available information on stream flow conditions that impact withdrawal rates.

(g) Persons required to participate in the survey and registration shall provide the most accurate information available on water withdrawal during seasonal conditions and future potential

maximum withdrawals or other information that the secretary determines is necessary for the completion of the survey or registration: *Provided*, That a coal-fired electric generating facility shall also report the nominal design capacity of the facility, which is the quantity of water withdrawn by the facility's intake pumps necessary to operate the facility during a calendar day.

(h) The secretary shall, to the extent reliable water withdrawal data is reasonably available from sources other than persons required to provide data and participate in the survey and registration, utilize that data to fulfill the requirements of this section. If the data is not reasonably available to the secretary, persons required to participate in the survey and registration are required to provide the data. Registered persons that report withdrawals on an annual basis for a period of three consecutive years are not required to register further withdrawals unless the amount withdrawn annually varies by more than ten percent from the three year average. Altering locations of intakes and discharge points that result in an impact to the withdrawal of the water resource by an amount of ten percent or more from the consecutive three year average shall also be reported.

(i) The secretary shall report regularly to the joint legislative oversight commission on state water resources to advise the commission of the progress of the survey as well as any problems that may be encountered in conducting the survey and to make recommendations on policy and statutory changes that may be needed.

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

(1) To the extent the information is available, the location and quantity of all surface water and groundwater resources in this state;

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

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

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

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

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

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

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

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

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

(k) In addition to any requirements for completion of the survey established by the secretary, the survey must accurately reflect both actual and maximum potential water withdrawal. Actual withdrawal shall be established through metering, measuring or alternative accepted scientific methods to obtain a reasonable estimate or indirect calculation of actual use.

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

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

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

#### **§22-25-4. Confidentiality.**

(a) Information required to be submitted by a person as part of the water withdrawal survey and registration that may be a trade secret, contain protected information relating to homeland security or be subject to another exemption provided by the state freedom of information act may be deemed confidential. Each such document shall be identified by that person as confidential information. The person claiming confidentiality shall provide written justification to the secretary at the time the information is submitted stating the reasons for confidentiality and why the information should not be released or made public. The secretary has the discretion to approve or deny requests for confidentiality as prescribed by this section.

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

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

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

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

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

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

(e) Information designated as confidential may be released to governmental entities, their employees and agents when compiling and analyzing survey and registration information and as may be necessary to develop the legislative report required by this section or to develop water resources plans. Any governmental entity or person receiving information designated confidential shall protect the information as confidential.

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

(g) All requests to inspect or copy documents shall state with reasonable specificity the documents or type of documents sought to be inspected or copied. Within ten business days of the receipt of a request, the secretary shall: (1) Advise the person making the request in writing of the time and place where the person may inspect and copy the documents which, if the request addresses

information claimed as confidential, may not be sooner than twenty days following the date of the determination to disclose, unless an earlier disclosure date is agreed to by the person claiming confidentiality; or (2) deny the request, stating in writing the reasons for denial. If the request addresses information claimed as confidential, then notice of the action taken pursuant to this subsection shall also be provided to the person asserting the claim of confidentiality.

(h) Any person adversely affected by a determination regarding confidential information under this article may appeal the determination to the appropriate circuit court pursuant to the provisions of article five, chapter twenty-nine-a of this code. The filing of a timely notice of appeal shall stay any determination to disclose confidential information pending a final decision on appeal. The scope of review is limited to the question of whether the portion of the records, reports, data or other information sought to be deemed confidential, inspected or copied is entitled to be treated as confidential under this section. The secretary shall afford evidentiary protection in appeals as necessary to protect the confidentiality of the information at issue, including the use of in camera proceedings and the sealing of records when appropriate.

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

(a) The president of the Senate and the speaker of the House of Delegates shall each designate five members of their respective houses, at least one of whom shall be a member of the minority party, to serve on a joint legislative oversight commission charged with immediate and ongoing oversight of the water resources survey and registration. This commission shall be known as the "Joint Legislative Oversight Commission on State Water Resources" and shall regularly investigate and monitor all matters relating to the water resources survey and the need for a water resources strategy and policy.

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

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

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

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

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