

H. B. 3071

(By Delegates Pino and Perry)

[Introduced March 22, 2013; referred to the
Committee on the Judiciary then Finance.]

**FISCAL
NOTE**

A BILL to amend the Code of West Virginia, 1931, as amended, by
adding thereto a new section, designated §22-11-22a, relating
to civil penalties and civil administrative penalties for
violations of the Water Pollution Control Act.

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 section, designated as §22-11-22a, to read
as follows:

ARTICLE 11. WATER POLLUTION CONTROL ACT.

**§22-11-22a. Civil penalties and injunctive relief; civil
administrative penalties for coal mining
operations.**

(a) Any person who holds a permit to operate a coal mining
operation issued under article three of this chapter who violates

1 any provision of any permit issued under or subject to the
2 provisions of this article or article eleven-a of this chapter is
3 subject to a civil penalty not to exceed \$25,000 per day of the
4 violation and any person who violates any provision of this article
5 or of any rule or who violates any standard or order promulgated or
6 made and entered under the provisions of this article, article
7 eleven-a of this chapter or article one, chapter twenty-two-b of
8 this code is subject to a civil penalty not to exceed \$25,000 per
9 day of the violation.

10 (1) Any such civil penalty may be imposed and collected only
11 by a civil action instituted by the secretary in the circuit court
12 of the county in which the violation occurred or is occurring or of
13 the county in which the waters thereof are polluted as the result
14 of such violation.

15 (2) In determining the amount of a civil penalty the circuit
16 court shall consider the seriousness of the violation or
17 violations, the economic benefit (if any) resulting from the
18 violation, any history of the violations, any good-faith efforts to
19 comply with the applicable requirements, cooperation by the
20 permittee with the secretary, the economic impact of the penalty on
21 the violator, and other matters as justice may require.

22 (3) Upon application by the secretary, the circuit courts of
23 the state or the judges thereof in vacation may by injunction
24 compel compliance with and enjoin violations of the provisions of

1 this article, article eleven-a of this chapter, the rules of the
2 board or secretary, effluent limitations, the terms and conditions
3 of any permit granted under the provisions of this article or
4 article eleven-a of this chapter or any order of the secretary or
5 board, and the venue of any such actions shall be the county in
6 which the violations or noncompliance exists or is taking place or
7 in any county in which the waters thereof are polluted as the
8 result of the violation or noncompliance. The court or the judge
9 thereof in vacation may issue a temporary or preliminary injunction
10 in any case pending a decision on the merits of any injunction
11 application filed. Any other section of this code to the contrary
12 notwithstanding, the state is not required to furnish bond as a
13 prerequisite to obtaining injunctive relief under this article or
14 article eleven-a of this chapter. An application for an injunction
15 under the provisions of this section may be filed and injunctive
16 relief granted notwithstanding that all of the administrative
17 remedies provided in this article have not been pursued or invoked
18 against the person or persons against whom such relief is sought
19 and notwithstanding that the person or persons against whom such
20 relief is sought have not been prosecuted or convicted under the
21 provisions of this article.

22 (4) The judgment of the circuit court upon any application
23 filed or in any civil action instituted under the provisions of
24 this section is final unless reversed, vacated or modified on

1 appeal to the Supreme Court of Appeals. Any such appeal shall be
2 sought in the manner provided by law for appeals from circuit
3 courts in other civil cases, except that the petition seeking
4 review in any injunctive proceeding must be filed with said Supreme
5 Court of Appeals within ninety days from the date of entry of the
6 judgment of the circuit court.

7 (5) Legal counsel and services for the director, secretary or
8 the board in all civil penalty and injunction proceedings in the
9 circuit court and in the Supreme Court of Appeals of this state
10 shall be provided by legal counsel employed by the department, the
11 Attorney General or his or her assistants and by the prosecuting
12 attorneys of the several counties as well, all without additional
13 compensation, or the director, secretary or the board, with the
14 written approval of the Attorney General, may employ counsel to
15 represent him or her or it in a particular proceeding.

16 (b) The secretary may assess a civil administrative penalty
17 whenever he or she finds that a person who holds a permit to
18 operate a coal mining operation issued under article three of this
19 chapter has violated any provision of this article or article
20 eleven-a of this chapter, any permit issued under or subject to the
21 provisions of this article or article eleven-a of this chapter or
22 any rule or order issued pursuant to this article or article
23 eleven-a of this chapter. A civil administrative penalty may be
24 assessed unilaterally by the director in accordance with this

1 subsection.

2 (1) Any civil administrative penalty assessed pursuant to this
3 section shall not exceed \$10,000 per violation and the maximum
4 amount of any civil administrative penalty assessed pursuant to
5 this section shall not exceed \$125,000: Provided, That any
6 stipulated penalties accrued after the date of the draft order
7 shall not be included for purposes of determining the total amount
8 of the civil administrative penalty. For purposes of this section,
9 a single operational upset which leads to simultaneous violations
10 of more than one pollutant parameter shall be treated as a single
11 violation.

12 (2) In determining the amount of any civil administrative
13 penalty assessed under this subsection, the secretary shall take
14 into account the nature, circumstances, extent and gravity of the
15 violation, or violations, and, with respect to the violator,
16 ability to pay, any prior history of such violations, the degree of
17 good faith, economic benefit or savings (if any) resulting from the
18 violation, cooperation of the alleged violator, and such other
19 matters as justice may require.

20 (3) No assessment may be levied pursuant to this subsection
21 until after the alleged violator has been notified by certified
22 mail or personal service pursuant to the West Virginia Rules of
23 Civil Procedure. The notice shall include a proposed order which
24 refers to the provision of the statute, rule, order or permit

1 alleged to have been violated, a concise statement of the facts
2 alleged to constitute the violation, a statement of the amount of
3 the administrative penalty to be imposed and a statement of the
4 alleged violator's right to an informal hearing prior to the
5 issuance of the proposed order.

6 (A) The alleged violator has thirty calendar days from receipt
7 of the notice within which to deliver to the secretary a written
8 request for an informal hearing.

9 (B) If no hearing is requested, the proposed order becomes a
10 draft order after the expiration of the thirty-day period.

11 (C) If an informal hearing is requested, the director shall
12 inform the alleged violator of the time and place of the hearing.
13 The secretary may appoint an assessment officer to conduct the
14 informal hearing and make a written recommendation to the secretary
15 concerning the proposed order and the assessment of a civil
16 administrative penalty.

17 (D) Within thirty days following the informal hearing, the
18 secretary shall render and furnish to the alleged violator a
19 written decision, and the reasons therefor, concerning the
20 assessment of a civil administrative penalty. The proposed order
21 shall be revised, if necessary, and shall become a draft order.

22 (4) The secretary shall provide the opportunity for the public
23 to comment on any draft order by publishing a Class II legal
24 advertisement in the newspaper with the largest circulation in the

1 county in which the violation occurred, and by other such means as
2 the secretary deems appropriate, which shall provide notice of the
3 draft order, including the civil administrative penalty assessment.
4 The secretary shall consider any comments received in determining
5 whether to revise the draft order before issuance of a final order.
6 During the thirty-day public comment period, any person may request
7 a public hearing regarding the draft order and the secretary may
8 grant or deny the request at his or her discretion. If a request
9 for a public hearing is denied, the secretary shall provide notice
10 to the person requesting a hearing and reasons for such denial.

11 (5) Within thirty days of the close of the public comment
12 period on a draft order, the secretary shall issue a final order or
13 make a determination not to issue a final order, and shall provide
14 written notice by certified mail or personal service pursuant to
15 the West Virginia Rules of Civil Procedure to the alleged violator
16 and shall provide notice by certified mail or personal service
17 pursuant to the West Virginia Rules of Civil Procedure to those
18 persons who submitted written comments on the draft order during
19 the public comment period.

20 (6) The issuance of a final order assessing a civil
21 administrative penalty pursuant to subsection (b) of this section
22 may be appealed to the environmental quality board pursuant to
23 section twenty-one of this article. Any person who submitted
24 written comments on a draft order during the public comment period

1 shall have the right to file such an appeal or intervene in any
2 appeal filed by the alleged violator.

3 (7) The authority to levy a civil administrative penalty is in
4 addition to all other enforcement provisions of this article and
5 the payment of any assessment does not affect the availability of
6 any other enforcement provision in connection with the violation
7 for which the assessment is levied: Provided, That no combination
8 of assessments against a violator under this section shall exceed
9 \$25,000 for each violation: Provided, however, That any violation
10 for which the violator has paid a civil administrative penalty
11 assessed under this section may not be the subject of a separate
12 civil penalty action. No assessment levied pursuant to this section
13 becomes due and payable until at least thirty days after receipt of
14 the final order or the procedures for review of the assessment,
15 including any appeals, have been completed, whichever is later.

16 (c) In addition to the authorities set forth in this section,
17 the secretary may also enter into agreements, settlements, and
18 other consent orders resolving alleged violations of this chapter.

19 (d) The secretary shall propose, for legislative review,
20 rules, including emergency rules, in accordance with the provisions
21 of article three, chapter twenty-nine-a of this code, to establish
22 procedures for assessing civil administrative penalties in
23 accordance with this section by no later than July 1, 2013.

NOTE: The purpose of this bill is to establish an

administrative and civil enforcement process for coal mining-related National Pollution Discharge Elimination System (NPDES) permit holders that conforms with corresponding federal requirements.

This section is new; therefore, it has been completely underscored.