

H. B. 4291

(By Delegates R. Phillips, Barker, Caputo, Craig, Marcum, Skaff, R. Smith, Sumner, Tomblin and White)

[Introduced January 24, 2014; referred to the Committee on Energy then the Judiciary.]

**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 by coal mining operations.

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

10 (1) A civil penalty may be imposed and collected only by a
11 civil action instituted by the secretary in the circuit court of
12 the county in which the violation occurred or is occurring or of
13 the county in which the waters of the county are polluted as the
14 result of the 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 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 circuit court judges 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. The venue for those actions is the county in which the
6 violations or noncompliance exists or is taking place or in any
7 county in which the waters are polluted as the result of the
8 violation or noncompliance. The court or the judge of the court in
9 vacation may issue a temporary or preliminary injunction in any
10 case pending a decision on the merits of any injunction application
11 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 the relief is sought and
19 notwithstanding that the person or persons against whom the relief
20 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. An appeal must be sought in
2 the manner provided by law for appeals from circuit courts in other
3 civil cases, except that the petition seeking review in any
4 injunctive proceeding must be filed with the Supreme Court of
5 Appeals within ninety days from the date of entry of the judgment
6 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 shall be provided
10 by legal counsel employed by the department, the Attorney General
11 or his or her assistants and by the prosecuting attorneys of the
12 several counties as well, all without additional compensation, or
13 the director, secretary or the board, with the written approval of
14 the Attorney General, may employ counsel to represent him or her or
15 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 may not exceed \$10,000 per violation and the maximum amount
4 of any civil administrative penalty assessed pursuant to this
5 section may not exceed \$125,000: *Provided*, That stipulated
6 penalties accrued after the date of the draft order are not
7 included for purposes of determining the total amount of the civil
8 administrative penalty. For purposes of this section, a single
9 operational upset which leads to simultaneous violations of more
10 than one pollutant parameter is a single violation.

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

19 (3) An assessment may not be levied pursuant to this
20 subsection until after the alleged violator has been notified by
21 certified mail or personal service pursuant to the West Virginia
22 Rules of Civil Procedure. The notice shall include a proposed order
23 which refers to the provision of the statute, rule, order or permit
24 alleged to have been violated, a concise statement of the facts

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

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

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

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

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

21 (4) The secretary shall provide the opportunity for the public
22 to comment on any draft order by publishing a Class II legal
23 advertisement in the newspaper with the largest circulation in the
24 county in which the violation occurred, and by other such means as

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

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

19 (6) The issuance of a final order assessing a civil
20 administrative penalty pursuant to this subsection may be appealed
21 to the Environmental Quality Board pursuant to section twenty-one
22 of this article. Any person who submitted written comments on a
23 draft order during the public comment period has the right to file
24 an appeal or intervene in any appeal filed by the alleged violator.

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

14 (c) The secretary may enter into agreements, settlements and
15 other consent orders resolving alleged violations of this chapter.

16 (d) The secretary shall propose, for legislative approval,
17 rules, including emergency rules, in accordance with the provisions
18 of article three, chapter twenty-nine-a of this code to establish
19 procedures for assessing civil administrative penalties in
20 accordance with this section no later than July 1, 2014.

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.