

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Committee Substitute

for

House Bill 2852

(BY DELEGATES HAMRICK, TRECOST AND ZATEZALO)

[Originating in the Committee on Finance;

February 15, 2016.]

1 A BILL to repeal §11-12-86 of the Code of West Virginia, 1931, as amended; to repeal §29-3-23,
2 §29-3-24, §29-3-25 and §29-3-26 of said code; to amend said code by adding thereto a
3 new article, designated §29-3E-1, §29-3E-2, §29-3E-3, §29-3E-4, §29-3E-5, §29-3E-6,
4 §29-3E-7, §29-3E-8, §29-3E-9, §29-3E-10, §29-3E-11, §29-3E-12 and §29-3E-13; and to
5 amend and reenact §61-3E-1 and §61-3E-11 of said code, all relating the regulation of
6 fireworks generally; authorizing sale of consumer fireworks; defining consumer fireworks;
7 establishing regulatory framework for sale of fireworks; defining terms; requiring
8 certificate; establishing fees; requiring permits; dedicating certain fees to Veterans
9 Facilities Support Fund, Fire Protection Fund and the State Road Fund; establishing rule-
10 making authority; creating criminal penalties related to the sale, manufacturing, importing
11 or storage of fireworks; defining terms; authorizing exemptions; requiring reporting; and
12 establishing internal effective dates for certain provisions.

Be it enacted by the Legislature of West Virginia:

1 That §11-12-86 of the Code of West Virginia, 1931, as amended, be repealed; that §29-
2 3-23, §29-3-24, §29-3-25 and §29-3-26 of said code be repealed; that said code be amended by
3 adding a new article, designated §29-3E-1, §29-3E-2, §29-3E-3, §29-3E-4, §29-3E-5, §29-3E-6,
4 §29-3E-7, §29-3E-8, §29-3E-9, §29-3E-10, §29-3E-11, §29-3E-12 and §29-3E-13; and that §61-
5 3E-1 and §61-3E-11 of said code be amended and reenacted, all to read as follows:

CHAPTER 29. MISCELLANEOUS BOARDS AND OFFICERS.

ARTICLE 3E. FIREWORKS SAFETY.

§29-3E-1. Unlawful acts.

1 It is unlawful for a person to manufacture, wholesale, distribute, import, sell or store for the
2 purpose of resale, consumer fireworks without a license, registration, certificate or permit from the
3 State Fire Marshal.

§29-3E-2. Definitions.

1 As used in this article:

2 (1) “Agricultural and wildlife fireworks” means fireworks devices distributed to farmers,
3 ranchers and growers through a wildlife management program administered by the United States
4 Department of the Interior or the Division of Natural Resources of this state;

5 (2) “Amusement park” means any person or organization which holds a permit for the
6 operation of an amusement ride or amusement attraction under article ten, chapter twenty-one of
7 the code;

8 (3) “APA Standard 87-1” means the APA Standard 87-1 published by the American
9 Pyrotechnics Association, as amended, and incorporated by reference into Title 49 of the Code
10 of Federal Regulations;

11 (4) “Articles pyrotechnic” means pyrotechnic devices for professional use that are similar
12 to consumer fireworks in chemical composition and construction but not intended for consumer
13 use, that meet the weight limits for consumer fireworks but are not labeled as such, and that are
14 classified as UN0431 or UN0432 under 49 C.F.R. §172.101 (2014);

15 (5) “Consumer fireworks” means small fireworks devices that are designed to produce
16 visible effects by combustion that are required to comply with the construction, chemical
17 composition and labeling regulations promulgated by the United States Consumer Product Safety
18 Commission under 16 C.F.R. Parts 1500 and 1507 (2014), and that are listed in APA Standard
19 87-1. Consumer fireworks do not include sparkling devices, novelties, toy caps or model rockets;

20 (6) “Consumer fireworks certificate” means a certificate issued under section four of this
21 article;

22 (7) “Display fireworks” means large fireworks to be used solely by professional
23 pyrotechnicians licensed by the State Fire Marshal and designed primarily to produce visible or
24 audible effects by combustion, deflagration or detonation and includes, but is not limited to,
25 salutes containing more than two grains (one hundred thirty milligrams) of explosive materials,
26 aerial shells containing more than forty grams of pyrotechnic compositions and other display

pieces that exceed the limits of explosive materials for classification as consumer fireworks and are classified as fireworks UN0333, UN0334, or UN0335 under 49 C.F.R. §172.101 (2014);

(8) "Distributor" means a person who sells fireworks to wholesalers and retailers for resale;

(9) "Division 1.3 explosive" means that term as defined in 49 C.F.R. §173.50 (2014);

(10) "Division 1.4 explosive" means that term as defined in 49 C.F.R. §173.50 (2014);

(11) "Explosive composition" means a chemical or mixture of chemicals that produces an audible effect by deflagration or detonation when ignited;

(12) "Fire Marshal" means the State Fire Marshal;

(13) "Firework" or "fireworks" means any composition or device designed for the purpose of producing a visible or audible effect by combustion, deflagration or detonation. Fireworks include consumer fireworks, display fireworks and special effects. Fireworks does not include sparkling devices, novelties, toy caps or model rockets;

(14) "Interstate wholesaler" means a person who is engaged in interstate commerce selling fireworks;

(15) "Model rocket" means that term as defined in National Fire Protection Association Standard 1122, "Code for Model Rocketry";

(16) "New explosive" means that term as defined in 49 C.F.R. §173.56 (2014);

(17) "NFPA 1123" means National Fire Protection Association Standard 1123, "Code for Fireworks Display."

(18) "NFPA 1124" means National Fire Protection Association Standard 1124, "Code for the Manufacture, Transportation, Storage, and Retail Sales of Fireworks and Pyrotechnic Articles," 2006 Edition.

(19) "NFPA 1126" means that term as defined in National Fire Protection Association Standard 1126, "Standard for the Use of Pyrotechnics Before a Proximate Audience."

(20) "Novelties" means that term as defined under APA standard 87-1, section 3.2; but shall not include toy pistols, toy caps, toy canes, toy guns or other similar devices;

(21) "Permanent" means that term as defined in NFPA 1124;

(22) "Person" means an individual or the responsible person for an association, an organization, a partnership, a limited partnership, a limited liability company, a corporation or any other group or combination acting as a unit;

(22) "Public display of fireworks" means a public entertainment feature that is advertised to the general public or is on public property that includes the display or discharge of consumer fireworks;

(23) "Pyrotechnic composition" means a mixture of chemicals that produces a visible or audible effect by combustion rather than deflagration or detonation. A pyrotechnic composition will not explode upon ignition unless severely confined;

(24) "Retailer" means a person who purchases consumer fireworks for resale to consumers;

(25) "Sparkling devices" means "ground or handheld sparkling devices" as that phrase is defined under APA 87-1, sections 3.1.1 and 3.5;

(26) "Special effects" means a combination of chemical elements or chemical compounds capable of burning independently of the oxygen of the atmosphere and designed and intended to produce an audible, visual, mechanical or thermal effect as an integral part of a motion picture, radio, television, theatrical or opera production or live entertainment;

(27) "Temporary" means that term as defined in NFPA 1124;

(28) "Toy caps" means that term as defined under APA 87-1, section 3.3; and

(29) "Wholesaler" means any person who sells consumer fireworks to a retailer or any other person for resale and any person who sells articles of pyrotechnics, display fireworks, and special effects to a person licensed to possess and use those devices.

§29-3E-3. Production or transportation of fireworks.

A person may produce or transport a firework within this state that is a new explosive and that is either a division 1.3 explosive or division 1.4 explosive if the person first meets the requirements of 49 C.F.R. §173.56 (2014).

§29-3E-4. Requirements for a retailer of consumer fireworks.

1 (a) A retailer may not sell consumer fireworks unless the retailer is certified under this
2 article.

3 (b) To be certified to sell consumer fireworks a retailer shall:

4 (1) Submit an application to the State Fire Marshal;

5 (2) Submit with the application a copy of his or her current business registration certificate;

6 (3) Pay the a fee of \$500.00 for each temporary retail sales location and \$1,000.00 for
7 each permanent retail sales location to the State Fire Marshal;

8 (4) Provide the State Fire Marshal proof that the retailer maintains at all times public liability
9 and product liability insurance with minimum coverage limits of \$1 million dollars per location to
10 cover losses, damages or injuries that might result from selling consumer fireworks; and

11 (5) Provide other information as the State Fire Marshal may require by legislative rule.

12 (c) A consumer fireworks certificate is valid from April 1 through March 31 of the next
13 calendar year or any fraction thereof.

14 (d) A consumer fireworks certificate is not transferable.

15 (e) A retailer shall post the certificate in a conspicuous place at the location of the
16 business.

17 (f) A separate copy of an issued certificate is required for each retail sales location of the
18 retailer.

19 (g) Any fees collected pursuant to this section shall be deposited in the Fire Marshal Fees
20 Fund established by the provisions of section twelve-b, article three, chapter twenty-nine of this
21 code.

29-3E-5. Requirements for a public fireworks display.

1 (a) Any municipality, county, fair association, amusement park or other organization shall
2 have a permit to present a public display of fireworks from the State Fire Marshall.

3 (b) To receive a permit, a municipality, fair association, amusement park, and other
4 organization shall:

5 (1) Submit an application to the State Fire Marshal;

6 (2) Pay the required fee, not to exceed \$50;

7 (3) Furnish proof of financial responsibility to satisfy claims for damages to property or
8 personal injuries arising out of any act or omission on the part of the party seeking the permit or
9 an employee thereof, in the amount, character and form as the State Fire Marshal determines to
10 be necessary for the protection of the public; and

11 (4) Provide any other information as the State Fire Marshal may require by legislative rule.

12 (c) The State Fire Marshal shall require the municipality, county, fair association,
13 amusement park and other organizations to give written notice to the local police and fire
14 authorities at least five days prior to the display for which the permit is sought.

15 (d) A permit is not transferable.

16 (e) The display shall be operated by a competent operator licensed or certified as to
17 competency by the State Fire Marshal and shall be of such composition, character, and so
18 located, discharged or fired so as to be safe in the opinion of the chief of the fire department
19 serving the community or area where such display is being held.

20 (f) The permittee shall require a bond from the licensee in a sum not less than \$1,000
21 conditioned on compliance with the provisions of this article and the rules of the State Fire Marshal
22 except where the licensee is an insured government entity.

23 (g) A retailer who sells consumer fireworks shall comply with all regulations provided in
24 NFPA 1124. The State Fire Marshal may by legislative rule, promulgate rules to supplement
25 those rules established in NFPA 1124.

26 (h) A retailer shall sell the consumer fireworks only from a permanent building or structure
27 that meets the specifications in NFPA 1124 or a temporary facility or structure that meets the
28 specifications of NFPA 1124.7.3.5.

29 (i) Any fees collected pursuant to this section shall be deposited in the Fire Marshal Fees
30 Fund established by the provisions of section twelve-b, article three, chapter twenty-nine of this
31 code.

§29-3E-6. Fireworks safety fee, administration, tax collections, remittances, deposits, distributions, rules, and enforcement.

1 (a) In addition to the general consumer sales and service tax imposed by article fifteen,
2 chapter eleven of this code, a fireworks safety fee of twelve percent of all sales is levied on retail
3 sales of consumer fireworks in this state. The fee shall be distributed pursuant to the provisions
4 of this subsection. The fee computation under this subsection shall be carried to the third decimal
5 place, and the fee rounded up to the next whole cent whenever the third decimal place is greater
6 than four, and rounded down to the lower whole cent whenever the third decimal place is four or
7 less.

8 (b) A person who purchases consumer fireworks in a retail transaction shall pay to the
9 retailer the amount of the fee levied by this section, which fee is added to and constitutes a part
10 of the sale price, and is collectible by the retailer who shall account to the state for all fees paid
11 by a purchaser. If the retailer fails to collect the fee, or fails to account to the state for the fees
12 paid by a purchaser, then the retailer is liable for the payment of the fee to the state.

13 (c) A retailer shall remit to the State Tax Commissioner no later than thirty days after the
14 end of each preceding month all moneys collected for such preceding month, pursuant to the
15 requirements of this section, and shall report such collections on forms and in the manner
16 prescribed by the State Tax Commissioner.

17 (d) All moneys so remitted, net of refunds and adjustments, shall be deposited and the
18 amount thereof shall be distributed and paid quarterly on the first day of the months of January,
19 April, July and October, into the funds and to the distributees as follows.

20 (1) One-third shall be deposited in the West Virginia Veterans' Facilities Support Fund
21 established by the provisions of section eleven-b, article one, chapter nine-a of this code.

22 (2) One-third shall be deposited in the Fire Protection Fund established in section thirty-
23 three, article three, chapter thirty-three, of this code, and distributed to each volunteer fire
24 company or department on an equal share basis by the State Treasurer.

25 (3) One-third shall be deposited in the State Road Fund established in section one, article
26 three, chapter seventeen of this code.

27 (e) Each and every provision of the West Virginia Tax Procedure and Administration Act
28 set forth in article ten, chapter eleven of this code, applies to the fees imposed pursuant to this
29 article, with like effect as if that act were applicable only to the fees imposed by this article and
30 were set forth in extenso in this article.

31 (f) Each and every provision of the West Virginia Tax Crimes and Penalties Act set forth
32 in article nine, chapter eleven of this code, applies to the fees imposed pursuant to this article,
33 with like effect as if that act were applicable only to the fees imposed by this article and were set
34 forth in extenso in this article.

35 (g) The State Tax Commissioner shall propose legislative rules and may promulgate such
36 emergency rules as are necessary to implement the provisions of this article.

37 (h) Notwithstanding any other provision of this code to the contrary, the State Tax
38 Commissioner may deduct and retain one percent of the fees collected pursuant to this section,
39 for the benefit of his or her office for general tax administration, from which expenditures are
40 permitted from collections without appropriation by the Legislature.

§29-3E-7. State Fire Marshal's Rule-making Authority.

1 (a) The State Fire Marshal may promulgate emergency rules and shall propose legislative
2 rules for promulgation, in accordance with the provisions of article three, chapter twenty-nine-a of
3 this code, to implement the provisions of this article, including:

4 (1) Adopting by reference the most recent edition of APA Standard 87-1;

5 (2) Adopting by reference the most recent edition of NFPA 1123, Code for Fireworks
6 Display;

7 (3) Adopting by reference NFPA 1124, code for the manufacture, transportation, storage
8 and retail sales of fireworks and pyrotechnic articles;

9 (4) Adopting by reference the most recent edition of NFPA 1126, standard for the use of
10 pyrotechnics before a proximate audience;

11 (5) Procedures for the issuance and renewal of a registration, certificate and permit;

12 (6) Establishing financial responsibility requirements, including insurance or bond
13 requirements, pursuant to section five of this article;

14 (7) Establishing additional criteria for the granting of a registration, certificate, or permit
15 under this article; and

16 (8) Regulation of manufacturers, wholesalers and distributors.

§29-3E-8. Exemptions.

1 This article does not prohibit any of the following:

2 (1) The use of fireworks by railroads or other transportation agencies for signaling
3 purposes or illumination;

4 (2) The use of agricultural and wildlife fireworks;

5 (3) The sale or use of blank cartridges for a theatrical performance, use by military
6 organizations or signal or ceremonial purposes in athletics or sports; or

7 (4) The possession, sale or disposal of fireworks incidental to the public display of
8 fireworks by wholesalers or other persons who have a permit to possess, store and sell explosives
9 from the Bureau of Alcohol, Tobacco, Firearms, and Explosives of the United States Department
10 of Justice and the State Fire Marshal.

§29-3E-9. Local municipalities' regulation of consumer fireworks.

1 This article does not affect the authority of the governing body of a municipality to prohibit
2 or regulate the possession, sale or use of consumer fireworks within its boundaries.

§29-3E-10. Violations of this article; penalties.

1 (a) A person may not intentionally ignite, discharge or use consumer fireworks on public property
2 or private property without the express permission of the owner to do so.

3 (b) A person may not intentionally ignite or discharge any consumer fireworks or sparkling
4 devices within or throw the same from a motor vehicle or building.

5 (c) A person may not intentionally ignite or discharge any consumer fireworks or sparkling
6 devices into or at a motor vehicle or building, or at any person or group of people.

7 (d) A person may not intentionally ignite or discharge any consumer fireworks or sparkling
8 devices while the person:

9 (1) Is under the influence of alcohol;

10 (2) Is under the influence of any controlled substance;

11 (3) Is under the influence of any other drug; or

12 (4) Is under the combined influence of alcohol and any controlled substance or any other
13 drug.

14 (e) A person who is less than sixteen years of age may not purchase, nor offer for sale,
15 consumer fireworks.

§29-3E-11. Miscellaneous offenses; penalties.

1 Any person who violates a provision of this article for which a penalty is not expressly set
2 forth is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than \$100.00
3 nor more than \$500.00. The provisions of this section shall be effective June 1, 2016.

§29-3E-12. Seizures by the Fire Marshal; enforcement of law.

1 The State Fire Marshal shall seize, take, remove and dispose of at public auction or
2 destroy, or cause to be seized, taken or removed and disposed of at public auction, or destroyed
3 at the expense of the owner, all stocks of fireworks offered for sale, stored or held in violation of
4 this article or an emergency or legislative rule promulgated hereunder.

§29-3E-13. Reporting requirements; Duration of reporting requirements.

1 Annually, on or before the fifteenth day of January 2017, 2018 and 2019:

2 (1) The State Treasurer shall submit to the President of the Senate and the Speaker of
3 the House of Delegates a report detailing the amount of revenue received and deposited from the

Fireworks Safety Fee into the Fire Protection Fund authorized by section six of this article and the distribution of said funds;

(2) The Secretary of Veterans' Assistance shall supply the President of the Senate and Speaker of the House of Delegates with a report detailing the revenue received from the Fireworks Safety Fee and deposited in the West Virginia Veterans' Facilities Support Fund and the purposes for which the money was expended;

(3) The State Tax Commissioner shall provide to the President of the Senate and Speaker of the House of Delegates a report detailing the revenue received from the general consumer sales and service tax received from the sale of fireworks authorized by the provisions of the article and revenue received from the Fireworks Safety Fee authorized by section six of this article; and

(4) The State Fire Marshall shall submit to the President of the Senate and Speaker of the House of Delegates a report detailing the amounts of revenue received from the registration fees imposed pursuant to the provisions of section four of this article, the purposes for which the fees were expended and the adequacy of the fees received in relation to the duties required of the office.

CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

ARTICLE 3E. OFFENSES INVOLVING EXPLOSIVES.

§61-3E-1. Definitions.

As used in this article, unless the context otherwise requires:

(a) "Destructive device" means any bomb, grenade, mine, rocket, missile, pipebomb or similar device containing an explosive, incendiary, explosive gas or expanding gas which is designed or so constructed as to explode by such filler and is capable of causing bodily harm or property damage; any combination of parts, either designed or intended for use in converting any device into a destructive device and from which a destructive device may be readily assembled.

"Destructive device" does not include a firearm as such is defined in section two, article seven of this chapter, or sparkling devices, novelties, toy caps, model rockets and their

components ~~twenty-three, article three, chapter twenty-nine of this code~~ or fireworks as these
terms are defined in section two, article three-e, chapter twenty-nine of this code, or high power
rockets and their components, as defined in this section.

(b) "Explosive material" means any chemical compound, mechanical mixture or device
that is commonly used or can be used for the purpose of producing an explosion and which
contains any oxidizing and combustive units or other ingredients in such proportions, quantities
or packaging that an ignition by fire, by friction, by concussion, by percussion, by detonator or by
any part of the compound or mixture may cause a sudden generation of highly heated gases.
These materials include, but are not limited to, powders for blasting, high or low explosives,
blasting materials, blasting agents, blasting emulsions, blasting fuses other than electric circuit
breakers, detonators, blasting caps and other detonating agents and black or smokeless powders
not manufactured or used for lawful sporting purposes, ~~or fireworks defined in section twenty-~~
~~three, article three, chapter twenty-nine of this code which are not used in violation of this article.~~
Also included are all explosive materials listed annually by the office of the State Fire Marshal and
published in the State Register, said publication being hereby mandated.

(c) "High power rocket" means the term as defined in National Fire Protection Association
Standard 1127, "Code for High Power Rocketry."

~~(e)~~ (d) "Hoax bomb" means any device or object that by its design, construction, content
or characteristics appears to be, or is represented to be or to contain a destructive device,
explosive material or incendiary device as defined in this section, but is, in fact, an inoperative
facsimile or imitation of such a destructive device, explosive material or incendiary device.

~~(d)~~ (e) "Incendiary device" means a container containing gasoline, kerosene, fuel oil, or
derivative thereof, or other flammable or combustible material, having a wick or other substance
or device which, if set or ignited, is capable of igniting such gasoline, kerosene, fuel oil, or
derivative thereof, or other flammable or combustible material: *Provided, That no similar device*

commercially manufactured and used solely for the purpose of illumination shall be deemed to be an incendiary device.

~~(e)~~ (f) "Legal authority" means that right as expressly stated by statute or law.

(g) "Model rocket" means the term as defined in National Fire Protection Association Standard 1122, "Code for Model Rocketry."

~~(f)~~ (h) "Person" ~~shall mean~~ means an individual, corporation, company, association, firm, partnership, society or joint stock company.

~~(g)~~ (i) "Storage magazine" is defined to mean any building or structure, other than an explosives manufacturing building, approved by the legal authority for the storage of explosive materials.

§61-3E-11. Exemptions.

(a) Unless specifically prohibited by any provision of this code or the laws of the United States, nothing in this article ~~shall prohibit~~ prohibits the authorized manufacture, sale, transportation, distribution, use or possession of any explosive material by any person holding a permit for such issued by the office of the State Fire Marshal. Any person performing a lawful activity pursuant to or regulated by the terms of a permit issued by the Division of Environmental Protection, or any office thereof, ~~shall be~~ is exempt from the provisions of this article.

(b) Unless specifically prohibited by any other provision of this code or the laws of the United States, nothing in this section ~~shall prohibit~~ prohibits the authorized manufacture, transportation, distribution, use or possession of any explosive, destructive device or incendiary device by a member of the armed forces or law-enforcement officers whenever such persons are acting lawfully and in the line of duty; nor shall it prohibit the manufacture, transportation, distribution, use or possession of any explosive material, destructive device or incendiary device to be used solely for lawful scientific research or lawful educational purposes. Any person engaged in otherwise lawful blasting activities failing to obtain a permit or in possession of an expired permit issued by the office of the ~~state fire marshal~~ State Fire Marshal ~~shall not be construed to be~~ is not in violation of the article.

- 17 (c) Nothing contained in this article applies to sparkling devices or novelties or to the sale,
18 purchase, possession, use, transportation or storage of fireworks as regulated in article three-e,
19 chapter twenty-nine of this code.