

# **WEST VIRGINIA LEGISLATURE**

## **2016 REGULAR SESSION**

**Introduced**

### **Senate Bill 535**

BY SENATORS BOSO, CARMICHAEL, FERNS, MAYNARD,

MULLINS, TRUMP, PLYMALE AND BLAIR

[Introduced February 6, 2016;

Referred to the Committee on Energy, Industry and Mining;

and then to the Committee on the Judiciary.]

1 A BILL to amend and reenact §22-11-4 of the Code of West Virginia, 1931, as amended, relating  
2 to requiring the Secretary of the Department of Environmental Protection to undertake a  
3 review of rules and requirements to determine whether they are more stringent than  
4 needed to satisfy the requirements of the federal Clean Water Act and to revise or repeal  
5 all requirements that do not meet that statutory mandate.

*Be it enacted by the Legislature of West Virginia:*

1 That §22-11-4 of the Code of West Virginia, 1931, as amended, be amended and  
2 reenacted to read as follows:

**ARTICLE 11. WATER POLLUTION CONTROL ACT.**

**§22-11-4. General powers and duties of director with respect to pollution.**

1 (a) In addition to all other powers and duties the director has and may exercise, subject to  
2 specific grants of authority to the chief or the board in this article or elsewhere in this code, the  
3 director has the following powers and authority and shall perform the following duties:

4 (1) To perform any and all acts necessary to carry out the purposes and requirements of  
5 this article and of the "Federal Water Pollution Control Act," 33 U.S.C. §1251, *et seq.*, as  
6 amended, relating to this state's participation in the "National Pollutant Discharge Elimination  
7 System," 33 U.S.C. §1342, established under that act;

8 (2) To encourage voluntary cooperation by all persons in the conservation, improvement  
9 and development of water resources and in controlling and reducing the pollution of the waters of  
10 this state, and to advise, consult and cooperate with all persons, all agencies of this state, the  
11 federal government or other states, and with interstate agencies in the furtherance of the purposes  
12 of this article, and to this end and for the purpose of studies, scientific or other investigations,  
13 research, experiments and demonstrations pertaining thereto, the division may receive moneys  
14 from such agencies, officers and persons on behalf of the state. The division shall pay all moneys  
15 so received into a special fund hereby created in the State Treasury, which fund shall be  
16 expended under the direction of the director solely for the purpose or purposes for which the grant,

17 gift or contribution was made;

18 (3) To encourage the formulation and execution of plans by cooperative groups or  
19 associations of municipal corporations, industries, industrial users, and other users of waters of  
20 the state, who, jointly or severally, are or may be the source of pollution of such waters, for the  
21 control and reduction of pollution;

22 (4) To encourage, participate in, or conduct or cause to be conducted studies, scientific or  
23 other investigations, research, experiments and demonstrations relating to the water resources  
24 of the state and water pollution and its causes, control and reduction, and to collect data with  
25 respect thereto, all as may be deemed advisable and necessary to carry out the purposes of this  
26 article;

27 (5) To study and investigate all problems concerning water flow, water pollution and the  
28 control and reduction of pollution of the waters of the state, and to make reports and  
29 recommendations with respect thereto;

30 (6) To collect and disseminate information relating to water pollution and the control and  
31 reduction thereof;

32 (7) To develop a public education and promotion program to aid and assist in publicizing  
33 the need for, and securing support for, pollution control and abatement;

34 (8) To sample ground and surface water with sufficient frequency to ascertain the  
35 standards of purity or quality from time to time of the waters of the state;

36 (9) To develop programs for the control and reduction of the pollution of the waters of the  
37 state;

38 (10) To exercise general supervision over the administration and enforcement of the  
39 provisions of this article, and all rules, permits and orders issued pursuant to the provisions of this  
40 article, article eleven-a of this chapter and article one, chapter twenty-two-b of this code;

41 (11) In cooperation with the college of engineering at West Virginia University and the  
42 schools and departments of engineering at other institutions of higher education operated by this

43 state, to conduct studies, scientific or other investigations, research, experiments and  
44 demonstrations in an effort to discover economical and practical methods for the elimination,  
45 disposal, control and treatment of sewage, industrial wastes, and other wastes, and the control  
46 and reduction of water pollution, and to this end, the director may cooperate with any public or  
47 private agency and receive therefrom, on behalf of the state, and for deposit in the State Treasury,  
48 any moneys which such agency may contribute as its part of the expenses thereof, and all gifts,  
49 donations or contributions received as aforesaid shall be expended by the director according to  
50 the requirements or directions of the donor or contributor without the necessity of an appropriation  
51 therefor, except that an accounting thereof shall be made in the fiscal reports of the division;

52 (12) To require the prior submission of plans, specifications, and other data relative to,  
53 and to inspect the construction and operation of, any activity or activities in connection with the  
54 issuance and revocation of such permits as are required by this article, article eleven-a of this  
55 chapter or the rules promulgated thereunder;

56 (13) To require any and all persons directly or indirectly discharging, depositing or  
57 disposing of treated or untreated sewage, industrial wastes or other wastes, or the effluent  
58 therefrom, into or near any waters of the state or into any underground strata, and any and all  
59 persons operating an establishment which produces or which may produce or from which  
60 escapes, releases or emanates or may escape, release or emanate treated or untreated sewage,  
61 industrial wastes or other wastes, or the effluent therefrom, into or near any waters of the state or  
62 into any underground strata, to file with the division such information as the director may require  
63 in a form or manner prescribed for such purpose, including, but not limited to, data as to the kind,  
64 characteristics, amount and rate of flow of any such discharge, deposit, escape, release or  
65 disposition;

66 (14) To adopt, modify, or repeal procedural rules and interpretive rules in accordance with  
67 the provisions of chapter twenty-nine-a of this code administering and implementing the powers,  
68 duties and responsibilities vested in the director by the provisions of this article and article eleven-

69 a of this chapter;

70 (15) To cooperate with interstate agencies for the purpose of formulating, for submission  
71 to the Legislature, interstate compacts and agreements relating to: (A) The control and reduction  
72 of water pollution; and (B) the state's share of waters in watercourses bordering the state;

73 (16) To adopt, modify, repeal and enforce rules, in accordance with the provisions of  
74 chapter twenty-nine-a of this code: (A) Implementing and making effective the declaration of policy  
75 contained in section one of this article and the powers, duties and responsibilities vested in the  
76 director and the chief by the provisions of this article and otherwise by law; (B) preventing,  
77 controlling and abating pollution; and (C) facilitating the state's participation in the "National  
78 Pollutant Discharge Elimination System" pursuant to the "Federal Water Pollution Control Act,"  
79 as amended: *Provided*, That no rule adopted by the director shall specify the design of equipment,  
80 type of construction or particular method which a person shall use to reduce the discharge of a  
81 pollutant; *Provided, however, That, notwithstanding any other provisions of the code to the*  
82 *contrary, no legislative rule or program of the secretary heretofore or hereafter adopted may be*  
83 *any more stringent than necessary to satisfy any federal requirement or any federal rule or*  
84 *program except to the limited extent that the secretary first makes a specific written finding for*  
85 *any such departure that there exists scientifically supportable evidence for the rule or program*  
86 *reflecting factors unique to West Virginia or some area thereof, or that the rule or program relates*  
87 *to fees or administrative procedures authorized by this article;* and

88 (17) To advise all users of water resources as to the availability of water resources and  
89 the most practicable method of water diversion, use, development and conservation.

90 (b) Whenever required to carry out the objectives of this article or article eleven-a of this  
91 chapter the director shall require the owner or operator of any point source or establishment to:  
92 (i) Establish and maintain such records; (ii) make such reports; (iii) install, use and maintain such  
93 monitoring equipment or methods; (iv) sample such effluents in accordance with such methods,  
94 at such locations, at such intervals and in such manner as the director shall prescribe; and (v)

95 provide such other information as the director may reasonably require.

96 (c) The director upon presentation of credentials: (i) Has a right of entry to, upon or through  
97 any premises in which an effluent source is located or in which any records required to be  
98 maintained under subsection (b) of this section are located; and (ii) may at reasonable times have  
99 access to and copy any records, inspect any monitoring equipment or method required under  
100 subsection (b) of this section and sample any streams in the area as well as sample any effluents  
101 which the owner or operator of such source is required to sample under subsection (b) of this  
102 section. Nothing in this subsection eliminates any obligation to follow any process that may be  
103 required by law.

104 (d) The director is hereby authorized and empowered to investigate and ascertain the  
105 need and factual basis for the establishment of public service districts as a means of controlling  
106 and reducing pollution from unincorporated communities and areas of the state, investigate and  
107 ascertain, with the assistance of the Public Service Commission, the financial feasibility and  
108 projected financial capability of the future operation of any such public service district or districts,  
109 and to present reports and recommendations thereon to the county commissions of the areas  
110 concerned, together with a request that such county commissions create a public service district  
111 or districts, as therein shown to be needed and required and as provided in article thirteen-a,  
112 chapter sixteen of this code. In the event a county commission fails to act to establish a county-  
113 wide public service district or districts, the director shall act jointly with the Commissioner of the  
114 Bureau of Public Health to further investigate and ascertain the financial feasibility and projected  
115 financial capability and, subject to the approval of the Public Service Commission, order the  
116 county commission to take action to establish such public service district or districts as may be  
117 necessary to control, reduce or abate the pollution, and when so ordered the county commission  
118 members must act to establish such a county-wide public service district or districts.

119 (e) The director has the authority to enter at all reasonable times upon any private or public  
120 property for the purpose of making surveys, examinations, investigations and studies needed in

121 the gathering of facts concerning the water resources of the state and their use, subject to  
122 responsibility for any damage to the property entered. Upon entering, and before making any  
123 survey, examination, investigation and study, such person shall immediately present himself or  
124 herself to the occupant of the property. Upon entering property used in any manufacturing, mining  
125 or other commercial enterprise, or by any municipality or governmental agency or subdivision,  
126 and before making any survey, examination, investigation and study, such person shall  
127 immediately present himself or herself to the person in charge of the operation, and if he or she  
128 is not available, to a managerial employee. All persons shall cooperate fully with the person  
129 entering such property for such purposes. Upon refusal of the person owning or controlling such  
130 property to permit such entrance or the making of such surveys, examinations, investigations and  
131 studies, the director may apply to the circuit court of the county in which such property is located,  
132 or to the judge thereof in vacation, for an order permitting such entrance or the making of such  
133 surveys, examinations, investigations and studies; and jurisdiction is hereby conferred upon such  
134 court to enter such order upon a showing that the relief asked is necessary for the proper  
135 enforcement of this article: *Provided*, That nothing in this subsection eliminates any obligation to  
136 follow any process that may be required by law.

137 (f) The secretary shall review all standards of quality with respect to surface waters and  
138 use designations and rules and programs implementing such standards or uses, heretofore or  
139 hereafter adopted, and report to the Legislative Rule-Making Review Committee on or before  
140 December 1, 2016, and after that on or before December 1 of every odd numbered year. In the  
141 report, the secretary shall identify all standards, use designations or implementing rules or  
142 program requirements, including permit requirements, that are more stringent than necessary to  
143 satisfy any requirements of the federal Water Pollution Control Act or any federal rule or program,  
144 except to the limited extent that the secretary first makes specific written finding for the departure  
145 that there exists scientifically supportable evidence for the rule or program reflecting factors  
146 unique to West Virginia or some area thereof and promptly initiate rulemaking action to revise or

147 repeal the standard, designation or rule. In the event the secretary or the Legislative Rulemaking  
148 Review Committee identifies any such standard, designation, rule or program requirement, the  
149 secretary or the Legislative Rulemaking Review Committee shall take immediate action to revise  
150 or repeal the requirement.

NOTE: The purpose of this bill is to require the Secretary of the Department of Environmental Protection to undertake a review of rules and requirements to determine whether they are more stringent than needed to satisfy the requirements of the federal Clean Water Act and to revise or repeal all requirements that do not meet that statutory mandate.

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