

**ARTICLE 5B.
NATURAL STREAMS PRESERVATION ACT.**

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§ 20-5B-1. Declaration of public policy.

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not impound, flood or divert all streams within the State of West Virginia, leaving no streams designated for preservation and protection in their natural condition, it is hereby declared to be the public policy of this State to secure for the citizens of West Virginia of present and future generations the benefits of an enduring resource of free-flowing streams possessing outstanding scenic, recreational, geological, fish and wildlife, botanical, historical, archeological, or other scientific or cultural values. (1969, c. 97.)

§ 20-5B-2. Definitions.

Unless the context, in which used, clearly requires a different meaning, as used in this article:

- (a) "Board" shall mean the state water resources board;
- (b) "Chief" shall mean the chief of the division of water resources of the department of natural resources;
- (c) "Director" shall mean the director of the department of natural resources;
- (d) "Free-flowing" shall mean existing or flowing in natural condition without impoundment, by diversion, or flooding of the waterway;
- (e) "Modification" shall mean the impounding, diverting or flooding of a stream within the natural stream preservation system;
- (f) "Modify" shall mean to impound, divert or flood a stream within the natural stream preservation system;

(g) "Permit" shall mean a permit required by section six [§ 20-5B-6] of this article;

(h) "Person," "persons" or "applicants" shall mean any public or private corporation, institution, association, firm by company organized or existing under the laws of this or any other state or country; State of West Virginia; governmental agencies; political subdivision; county court; municipal corporations; industries; sanitary district; public service district; drainage district; soil conservation district; watershed improvement district; partnership; trust; estate; person or individual; group of persons or individuals acting individually or as a group; or any other legal entity whatever;

(i) "Protected stream" shall mean any stream designated as such in section four [§ 20-5B-4] of this article, but shall not include tributaries or branches unless specifically designated or described in section four of this article;

(j) "Stream" shall mean a flowing body of water or a section or portion thereof, including rivers, streams, creeks, branches or small lakes. (1969, c. 97.)

"Diversion" of stream. -- A fill constructed in a way which invades the water of a stream constitutes a diversion of the stream. Op. Att'y Gen., Dec. 3, 1975.

§ 20-5B-3. Establishment of natural stream preservation system.

For the purpose of implementing the public policy declared in section one [§ 20-5B-1] of this article, there is hereby established a natural stream preservation system to be composed of streams designated by the legislature as "protected streams," and these shall be administered for the use and enjoyment of the citizens of West Virginia in such manner as will leave them unimpaired for future use and enjoyment as free-flowing streams, and so as to provide for the protection and the preservation of these streams in their natural character. (1969, c. 97.)

§ 20-5B-4. Designation of protected streams.

The following streams are hereby designated as protected streams within the natural streams preservation system, namely:

- (a) Greenbrier river from its confluence with Knapps creek to its confluence with the New river.
- (b) Anthony creek from its headwaters to its confluence with the Greelibrier river.
- (c) Cranberry river from its headwaters to its confluence with the Gauley river.
- (d) Birch river from the Cora Brown bridge in Nicholas county to the confluence of the river with the Elk river.
- (e) New river from its confluence with the Gauley river to its confluence with the Greenbrier river. (1969, c. 97; 1975, c. 174.)

Confluence of two streams can be established by surveying a line where a water of larger dimension is intersected by a water of smaller dimension. The line of measurement of the first crosses the latter at the points of junction, from headland to headland. Op. Att'y Gen., Dec. 3, 1975.

§ 20-5B-5. General powers and duties of chief of division of water resources and water resources board with respect to protected streams.

(a) In addition to all other powers and duties of the chief of the department's division of water resources, as prescribed in this article or elsewhere by law, the chief, under the supervision of the director, shall exercise general supervision over the administration and enforcement of the provisions of this article, and all orders and permits issued pursuant to the provisions of this article.

(b) In addition to all other powers and duties of the water resources board, as prescribed in this article or elsewhere by law, the board shall have authority to promulgate rules and regulations, in accordance with the provisions of chapter twenty-nine-A [§ 29A-1-1 et seq.] of this Code, to implement and make effective the powers, duties and responsibilities vested in the board and the chief by the provisions of this article and otherwise by law: Provided, that all such rules and regulations shall be consistent with the declaration of public policy set forth in section one [§ 20-5B-1] of this article.

(c) The board is hereby authorized to hire one or more individuals to serve as hearing examiners on a full or part-time basis. Such individuals may be attorneys-at-law admitted to practice before any circuit court of this State. All such hearing examiners shall be individuals authorized to take depositions under the laws of this State.

(d) The board, any member thereof and the chief, and their duly authorized representatives, shall have the power and authority to make investigations, inspections and inquiries concerning compliance with the provisions of this article, any order made and entered in accordance with the provisions of this article, any rules or regulations promulgated by the board, and with the terms and conditions of any permit issued in accordance with the provisions of section eight [§ 20-5B-8] of this article. In order to make such investigations, inspections and inquiries, the board, any member thereof and the chief, and their duly authorized representatives, shall have the power and authority to enter at all reasonable times upon any private or public property, subject to responsibility for any damage to the property entered. Upon entering, and before making any investigation, inspection and inquiry, such person shall immediately present himself to the occupant of the property. Upon entering property used in any manufacturing, mining or other commercial enterprise, or by any municipality or governmental agency or a subdivision, and before making any investigation, inspection and inquiry, such person shall immediately present himself to the Person in charge of the operation, and if he is not available, to a managerial employee. All persons shall cooperate fully with the person entering such property for such purposes. Upon a refusal of the person owning or controlling such property to permit such entrance or the making of such inspections, 40 investigations and inquiries, the board or the chief may apply to the circuit court of the county in which such property is located, or to the judge thereof in vacation, for an order permitting such entrance and the making of such inspections, investigations, and inquiries; and jurisdiction is hereby conferred upon such court to enter such order upon a showing that the relief asked is necessary for the proper enforcement of this article: Provided, however, that a dwelling occupied for residential purposes shall not be entered without a search warrant. (1969, c. 97.)

§ 20-5B-6. When permits required; when permits not to be issued.

It shall be unlawful for any person, until the department's permit therefor has been granted, to modify any protected stream or any part thereof. No permit shall be issued unless the work proposed to be done under such permit: (a) Will not materially alter or affect the free-flowing characteristics of a substantial part of a protected stream or streams; (b) is necessary to prevent an undue hardship; and (c) meets with the approval of the chief. (1969, c. 97.)

§ 20-5B-7. Application for permit; form of application; information required; fees.

The chief shall prescribe a form of application for all permits. All applications for permits shall be submitted to the division of water resources and shall be on the prescribed form.

A permit fee of ten dollars shall accompany the application when filed with the division of water resources. The permit fee shall be deposited in the state treasury to the credit of the state general fund. (1969, c. 97.)

§ 20-5B-8. Procedure for issuance or denial of permit; transfer of permits.

(a) Before issuing a permit, a public hearing shall be held. The chief shall consider the application and shall fix a time and place for hearing on such application. The hearing shall be held in a county in which the proposed modification is to be made and, if the' proposed modification is to be made in more than one county, then a separate hearing shall be held in each county in which the proposed modification is to be made. The applicant shall cause a notice of the time and place of such hearing and the purpose thereof to be published as a Class 111-0 legal advertisement in compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this Code, and the publication area for such publication shall be the county or counties in which the proposed modification is to be made. Publication of the notice shall be completed at least fifteen days before such hearing. The applicant shall also cause to be served, at least fifteen days before such hearings, in the manner provided by law for the service of notice and process, a notice showing the time, place and purpose of such hearing, upon every owner of property, and every person holding a lien thereon, abutting on that portion of the stream on which the modification is to be made, or abutting on any portion of such stream within two miles above or below the proposed modification. The affidavit of Publication of such notice shall be filed with the chief or his duly designated hearing examiner at or before the hearing as a part of the record in the proceedings.

(b) At the time and place fixed for the hearings, the chief or his duly designated hearing examiner shall hear any evidence relating to the proposed modification, the necessity therefor, the effect of such modification on the stream and any and all other matters relevant to the application and the proposed modification. If the chief concludes and finds upon the record and evidence in the proceedings that the proposed modification should be permitted, he shall proceed to issue the

permit: Provided, however, that the director may attach such conditions, qualifications or limitations to such permit as he finds appropriate.

(c) An application for any such permit shall be acted upon by the chief and the department's permit delivered or mailed, or a copy of any order of the chief denying any such application mailed as hereinafter specified, as the case may be, to the applicant by the chief within forty-five days after the hearings have been completed.

(d) When it is established that an application for a permit should be denied, the chief shall make and enter an order to that effect, which order shall specify the reasons for such denial, and shall cause a copy of such order to be served on the applicant by registered or certified mail. The chief shall also cause a notice to be served with the copy of such order, which notice shall advise the applicant of his right to appeal to the board by filing a notice of appeal, on a form prescribed by the board for such purpose, with the board, in accordance with the provisions of section ten [§ 20-5B-10] of this article, within thirty days after the date upon which the applicant received the copy of such order. However, an applicant may offer the plans and specifications for the proposed modification and submit a new application for any such permit, in which event the procedure hereinbefore outlined with respect to an original application shall apply.

(e) Upon the sale of property which includes an activity for which the department's permit was granted, the permit shall be transferable to the new owner, but the transfer shall not become effective until it is made in the records of the division of water resources. (1969, c. 97.)

20-5B-9. Inspections; orders to compel compliance with permits; service of order.

After issuance of the department's permit for any such modification, the chief and his duly authorized representatives may make field inspections of the work on the modification, and, after completion thereof, may inspect the completed modification, and, from time to time, may inspect the maintenance and operation of such modification.

To compel compliance with the terms and conditions of the department's permit for any such modification and with the plans and specifications therefor and the plan of maintenance and method of operation thereof, the chief is hereby authorized after reasonable notice to make and enter an order revoking or suspending such permit and directing the person to whom such permit was issued to stop or suspend any and all work on such activity or to take affirmative action to correct the deficiencies specified in such order so there will be full compliance with the terms and conditions of such permit and with the plans and specifications therefor, and the plan of maintenance and method of operation thereof.

The chief shall cause a copy of any such order to be served by registered or certified mail or by a conservation officer or other law-enforcement officer upon the person to whom any such permit was issued. The chief shall also cause a notice to be served with the copy of such order, which notice shall advise such person of his right to appeal to the board by filing a notice of on the form prescribed by the board for such purpose, with the board, in accordance with the provisions of section ten [§ 20-5B-10] of this article, within thirty days after the date upon which such person received the copy of such order. (1969, c. 97.)

§ 20-5B-10. Appeal to water resources board.

(a) Any person adversely affected by an order made and entered by the chief in accordance with the provisions of this article, or aggrieved by failure or refusal of the chief to act within the time required by section eight [§ 20-5B-8] of this article on an application for a permit or aggrieved by the terms and conditions of a permit granted under the provisions of this article, may appeal to the water resources board for an order vacating or modifying such order, or for such order, action or terms and conditions as the chief should have entered, taken or imposed. The person so appealing shall be known as the appellant and the chief shall be known as the appellee.

(b) Such appeal shall be perfected by filing a notice of appeal, on the form prescribed by the board for such purpose, with the board within thirty days after the date upon which the appellant received the copy of such order, or received such permit, as the case may be. The filing of the notice of appeal shall stay or suspend execution of any order appealed from. The notice of appeal shall set forth the order or terms and conditions complained of and the grounds upon which the appeal is based. A copy of the notice of appeal shall be filed by the board with the chief within three days after the notice of appeal is filed with the board.

(c) Within seven days after receipt of his copy of the notice of appeal, the chief shall prepare and certify to the board a complete record of the proceedings out of which the appeal arises, including all documents and correspondence in the chief's file relating to the matter in question. With the consent of the board and upon such terms and conditions as the board may prescribe, any persons affected by any such modification may by petition intervene as a party appellant or appellee. The board shall hear the appeal de novo, and evidence may be offered on behalf of the appellant and appellee, and, with the consent of the board, by any intervenors. No such hearing shall be heard on such appeal until ten days following service of notice of such appeal on all persons shown by the record to be interested in the matter.

(d) All of the pertinent provisions of article five [§ 29A-5-1 et seq.], chapter twenty-nine-A of this Code shall apply to and govern the hearing on appeal authorized by this section and the administrative procedures in connection with and following such hearing, with like effect as if the provisions of said Article five were set forth in extenso in this section, with the following modifications. or exceptions:

(1) Unless the board directs otherwise, the appeal hearing shall be held in the city of Charleston, Kanawha count , West Virginia; and

(2) In accordance with the provisions of section one [§ 29A-5-1], article five of said chapter twenty-nine-A, all of the testimony at any such hearing shall be recorded by stenographic notes and characters or by mechanical means. Such reported testimony shall in every appeal hearing under this article be transcribed.

(e) Any such appeal hearing shall be conducted by a quorum of the board, but the parties may by stipulation agree to take evidence before a hearing examiner employed by the board. Upon request of any party to the appeal, the evidence taken before a hearing examiner shall be taken in

the county in which the modification is proposed to take place, or, if the modification is to take place in more than one county, the hearing shall be held in the county most extensively affected by the modification. For the purpose of conducting such appeal hearing, any member of the board and the secretary thereof shall have the power and authority to issue subpoenas duces tecum in the name of the board, in accordance with the provisions of section one, article five, chapter twenty-nine-A [§ 29A-6-1] of this Code. All subpoenas and subpoenas duces tecum shall be issued and served within the time and for the fees and shall be enforced, as specified in section one, article five of said chapter twenty-nine-A, and all of the said section one provisions dealing with subpoenas and subpoenas duces tecum shall apply to subpoenas and subpoenas duces tecum issued for the purposes of an appeal hearing hereunder.

(f) Any such hearing shall be held within twenty days after the date upon which the board received the timely notice of appeal, unless there is a postponement or continuance. The board may postpone or continue any hearing upon its own motion, or upon application of the appellant, the appellee or any intervenors for good cause shown. The chief shall be represented at any such hearing by the attorney general or his assistant. At any such hearing the appellant and any intervenor may represent himself or be represented by an attorney-at-law admitted to practice before any circuit court of this State.

(g) After such hearing and consideration of all the testimony, evidence, and record in the case, the board shall make and enter an order affirming, modifying, or vacating the order of the chief, or shall make and enter such order as the chief should have entered, or shall make and enter an order approving or modifying the terms and conditions of any permit issued. In determining its course of action, the board shall take into consideration the factors which the chief had to consider in making his order, and fixing the terms and conditions of such permit, as set forth in section eight [§ 20-5B-8] or nine [§ 20-5B-9] of this article as the case may be.

(h) Such order shall be accompanied by findings of fact and conclusions of law as specified in section three [§ 29A-5-3], article five, chapter twenty-nine-A of this Code, and a copy of such order and accompanying findings and conclusions shall be served upon the appellant, and any intervenors, and their attorneys of record, if any, and upon the appellee in person or by registered or certified mail.

(i) The board shall also cause a notice to be served with the copy of such order, which notice shall advise the appellant, the appellee and any intervenors of their right to judicial review, in accordance with the provisions of section eleven [§ 20-5B-11] of this article. The order of the board shall be final unless vacated or modified upon judicial review thereof in accordance with the provisions of section eleven of this article. (1969, c. 97.)

§ 20-5B-11. Judicial review.

(a) Any person or the chief adversely affected by a final order made and entered by the board after such appeal hearing, held in accordance with the provisions of section ten [§ 20-5B-10] of this article, is entitled to judicial review thereof. All of the pertinent provisions of section four [§

29A-5-4], article five, chapter twenty-nine-A of this Code shall apply to and govern such review with like effect as if the provisions of said section four were set forth in extenso in this section, with the following modifications or exceptions:

(1) As to cases involving an order denying an application for a permit, or approving or modifying the terms and conditions of a permit, the petition shall be filed, within the time specified in said section four, in the circuit court of any county in which such modification is proposed to be made.

(2) As to cases involving an order revoking or suspending a permit and directing any and all work on such modification to stop, or directing that affirmative action be taken to correct alleged and specified deficiencies concerning any such modification, the petition shall be filed, within the time specified in said section four, in the circuit court of any county in which any part of such modification is proposed to be made.

(b) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals in accordance with the provisions of section one [§ 29A-6-1], article six, chapter twenty-nine-A of this Code, except that notwithstanding the provisions of said section one, the petition seeking such review must be filed with said supreme court of appeals within ninety days of the date of entry of the judgment of the circuit court.

(c) Legal counsel and services for the chief in all appeal proceedings in the circuit court and in the supreme court of appeals of this State shall be provided by the attorney general or his assistant and in appeal proceedings in the circuit courts by the prosecuting attorneys of the several counties as well, all without additional compensation, or the board or chief, with the written approval of the attorney general may employ special counsel to represent the board or chief in a particular proceeding. (1969, c. 97.)

§ 20-5B-12. Actions to abate nuisances; injunctive relief.

Whether any violation of the provisions of this article or any final order of the chief or the board shall result in prosecution or conviction or not, any such violation shall be deemed a nuisance which may be abated upon application by the chief to the circuit court of the county in which such nuisance or any part thereof shall exist, or to the judge thereof in vacation. Upon application by the chief, the circuit courts of this State may by mandatory or prohibitive injunction compel compliance with all final orders of the chief or board. Any application for an injunction to compel compliance with any final order of the chief or board shall be made to the circuit court of any county in which the modification to which the order relates is proposed to be made, or in which the modification to which the order relates is situate or would be situate upon completion thereof. Upon application by the chief to the circuit court of the county in which a municipal corporation is located, or in which any person resides or does business, or to the judge thereof in vacation, such court may by injunction require the performance of any duty imposed upon such municipal corporation or person by the provisions of this article. The court may issue a temporary injunction in any case pending a decision on the merits of any application filed. In cases of modifications where irreparable damage will result from any delay incident to the administrative procedures set forth in this article, the chief, with the consent of the director, may forthwith apply

to the circuit court of any county in which the modification is taking place for a temporary injunction. Such court may issue a temporary injunction pending final disposition of the case by the chief or the board, in the event an appeal is taken to the board.

The judgment of the circuit court upon any application permitted by the provisions of this section shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals. Any such appeal shall be sought in a manner provided by law for appeals for circuit courts in other civil cases, except that the petition seeking such review must be filed with said supreme court of appeals within ninety days from the date of entry of the judgment of the circuit court.

The chief shall be represented in all such proceedings by the attorney general or his assistant and in such proceedings in the circuit court by the prosecuting attorneys of the several counties as well, all without additional compensation. (1969, c. 97.)

§ 20-5B-13. Priority of actions.

All applications under section twelve [§ 20-5B-12] of this article and all proceedings for judicial review under section eleven [§ 20-5B-11] of this article shall take priority on the docket of the circuit court in which pending, and shall take precedence over all other civil cases. Where such applications and proceedings for judicial review are pending at the same time, such applications shall take priority on the docket and shall take precedence over proceedings for judicial review. (1969, c. 97.)

§ 20-5B-14. Violations; criminal penalties.

Any person who fails or refuses to discharge any duty imposed upon him by this article or by any final order of the chief or board, or who fails or refuses to apply for and obtain a permit as required by the provisions of this article, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished for a first offense by a fine of not less than twenty-five dollars nor more than one hundred dollars, and for a second offense by a fine of not less than two hundred dollars nor more than five hundred dollars, and for a third offense and each subsequent offense by a fine of not less than five hundred dollars nor more than one thousand dollars or by imprisonment for a period not to exceed six months, or in the discretion of the court by both such fine and imprisonment. (1969, c. 97.)

§ 20-5B-15. Exceptions as to criminal liabilities.

The criminal liabilities imposed by section fourteen [§ 20-5B-14] of this article shall not be construed to include any violation resulting from accident or caused by an act of God, war, strike, riot or other catastrophe as to which negligence or willful conduct on the part of such person was not the approximate cause. (1969, c. 97.)

§ 20-5B-16. Short title.

This article may be known and cited as the “Natural Streams Preservation Act.” (1969, c. 97.)

§ 20-5B-17. Severability of provisions.

If any provision of this article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or its application, and to this end the provisions of this article are declared to be severable. (1969, c. 97.)