West Virginia Statutes

Chapter 22 Environmental Resources, 1994 Replacement Volume

(Submitted as part of Program Revision 1 Program Description Appendix N)

CHAPTER 22.

ENVIRONMENTAL RESOURCES.

Article

Cross references. — Lease and conveyance of mineral interests owned by missing or unknown owners or abandoning owners, see c. 55, art. 12A.

Editor's notes. — Acts 1994, c. 61 amended and reenacted this chapter, substituting present articles one through twenty for former articles one through thirteen, concerning the department of energy and the West Virginia Energy Act. Present article 21 was added by Acts 1994, c. 24. For information concerning the span, history and subject matter of former articles one through thirteen, see the editor's notes at the beginning of each article.

ARTICLE 1.

DIVISION OF ENVIRONMENTAL PROTECTION.

Sec.

Editor's notes. — Acts 1994, c. 61 amended and reenacted this article, substituting present §§ 22-1-1 to 22-1-15 for former §§ 22-1-1 to 22-1-19 (enacted by Acts 1991, 2nd Ex. Sess., c. 15), concerning the former department of energy. The new provisions are sufficiently different from former §§ 22-1-1 to 22-1-19 that a detailed explanation of the changes and the retention of historical citations from the former laws were impracticable. Former §§ 22-1-5a, 22-1-7a, 22-1-8a, 22-1-9a, 22-1-10a, 22-1-20 and 22-1-21 were previously repealed by Acts 1991, 2nd Ex. Sess., c. 15.

W. Va. Law Review. — Flannery and Lannan, "Hazardous Waste — The Oil and Gas Exception," 89 W. Va. L. Rev. 1089 (1987).

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§ 22-1-1. Legislative findings; legislative statement of policy and purpose.

(a) The Legislature finds that:

(1) Restoring and protecting the environment is fundamental to the health and welfare of individual citizens, and our government has a duty to provide and maintain a healthful environment for our citizens.

(2) The state has the primary responsibility for protecting the environment; other governmental entities, public and private organizations and our citizens have the primary responsibility of supporting the state in its role as protector of the environment.

(3) Governmental decisions on matters which relate to the use, enhancement, preservation, protection and conservation of the environment should be made after public participation and public hearings.

(4) Efficiency in the wise use, enhancement, preservation, protection and conservation of the environment can best be accomplished by an integrated and interdisciplinary approach in decision making and would benefit from the coordination, consolidation and integration of state programs and agencies which are significantly concerned with the use, enhancement, preservation, protection and conservation of the environment.

(5) Those functions of government which regulate the environment should be consolidated in order to accomplish the purposes set forth in this article, to carry out the environmental functions of government in the most efficient and cost effective manner, to protect human health and safety and, to the greatest degree practicable, to prevent injury to plant, animal and aquatic life, improve and maintain the quality of life of our citizens, and promote economic development consistent with environmental goals and standards.

(b) The Legislature declares that the establishment of a division of environmental protection is in the public interest and will promote the general welfare of the state of West Virginia without sacrificing social and economic development. It is the policy of the state of West Virginia, in cooperation with other governmental agencies, public and private organizations, and the citizens of this state, to use all practicable means and measures to prevent or eliminate harm to the environment and biosphere, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations. The purposes of this chapter are:

(1) To strengthen the commitment of this state to restore, maintain and protect the environment;

(2) To consolidate environmental regulatory programs in a single state agency;

(3) To provide a comprehensive program for the conservation, protection, exploration, development, enjoyment and use of the natural resources of the state of West Virginia;

(4) To supplement and complement the efforts of the state by coordinating state programs with the efforts of other governmental entities, public and private organizations, and the general public; to improve the quality of the environment, the public health and public enjoyment of the environment, and the propagation and protection of animal, aquatic and plant life, in a manner consistent with the benefits to be derived from strong agricultural, manufacturing, tourism and energy-producing industries;

(5) Insofar as federal environmental programs require state participation, to endeavor to obtain and continue state primacy in the administration of such federally-mandated environmental programs, and to endeavor to maximize federal funds which may be available to accomplish the purposes of the state and federal environmental programs and to cooperate with appropriate federal agencies to meet environmental goals;

(6) To encourage the increased involvement of all citizens in the development and execution of state environmental programs;

(7) To promote improvements in the quality of the environment through research, evaluation and sharing of information;

(8) To improve the management and effectiveness of state environmental protection programs; and

(9) To increase the accountability of state environmental protection programs to the governor, the Legislature and the public generally. (1994, c. 61.)

Regulation of environmental programs. — All environmental programs in West Virginia are to be regulated by the division of environmental protection. Solid Waste Servs. v. Public Serv. Comm'n, 188 W. Va. 117, 422 S.E.2d 839 (1992).

Landfill regulation. — The proper forum for arguing changes in landfill regulation is the division of environmental protection, not the public service commission. Solid Waste Servs. v. Public Serv. Comm'n, 188 W. Va. 117, 422 S.E.2d 839 (1992).

There is no requirement that a hauler of refuse use its own landfill; the two activities are different operations even if they are undertaken by the same entity. Solid Waste Servs. v. Public Serv. Comm'n, 188 W. Va. 117, 422 S.E.2d 839 (1992).

§ 22-1-2. Definitions.

As used in this article, unless otherwise provided or indicated by the context:

(1) "Department" means the department of commerce, labor and environmental resources.

(2) "Director" means the director of the division of environmental protection.

(3) "Division" means the division of environmental protection.

(4) "Function" includes any duty, obligation, power, authority, responsibility, right, privilege, activity or program.

(5) "Office" includes any office, board, agency, unit, organizational entity, or component thereof.

(6) "Secretary" means the secretary of the department of commerce, labor and environmental resources. (1994, c. 61.)

§ 22-1-3. Rule making generally; relationship to federal programs.

(a) The director has the power and authority to propose legislative rules for promulgation in accordance with the provisions of article three [§ 29A-3-1 et seq.], chapter twenty-nine-a of this code to carry out and implement the provisions of this chapter and to carry out and implement any other provision of law relating to offices or functions of the division.

(b) The requirements and limitations set forth in this section apply to any rule-making authority granted pursuant to this chapter or chapters twenty-two-b and twenty-two-c [§§ 22B-1-1 et seq. and 22C-1-1 et seq.] of this code.

(c) Prior to the proposal of any new rule, the director shall consult with the division of environmental protection advisory council and after such consultation, the director may determine that such a rule should be the same in substance as a counterpart federal regulation. If the director determines that the rule should be the same in substance as a counterpart regulation, then to the greatest degree practicable, such proposed rule shall incorporate by reference the counterpart federal regulation. The director shall file, contemporaneously with the proposed rule, a statement setting forth whether the rule is the same in substance as a counterpart federal regulation. If the director determines that the rule should not be the same in substance as a counterpart federal regulation, then the director shall file contemporaneously with the proposed rule, a statement setting forth the differences between the proposed rule and the counterpart federal regulation. In addition, the director shall file a statement setting forth the results of the consultation with the advisory council.

(d) Whenever any existing rule is modified, amended or replaced, the provisions of subsection (c) of this section apply to the proposal of any such modification, amendment or replacement rule.

(e) Notwithstanding the provisions of article three, chapter twenty-nine-a of this code, at least one public hearing shall be held by the division in conjunction with each rule making prior to the expiration of the public comment period for the proposed rules. (1994, c. 61.)

§ 22-1-3a. Rules — New or amended environmental provisions.

Except for legislative rules promulgated for the purpose of implementing the provisions of section four, article twelve, section six, article seventeen, and section six, article eighteen [§§ 22-12-4, 22-17-6 and 22-18-6], all of this chapter, and notwithstanding the provisions of section four [§ 22-5-4], article five of this chapter, legislative rules promulgated by the director which become effective on or after the first day of July, one thousand nine hundred ninety-four, may include new or amended environmental provisions which are more stringent than the counterpart federal rule or program to the extent that the director first provides specific written reasons which demonstrate that such provisions are reasonably necessary to protect, preserve or enhance the quality of West Virginia's environment or human health or safety, taking into consideration the scientific evidence, specific environmental characteristics of West Virginia or an area thereof, or stated legislative findings, policies or purposes relied upon by the director in making such determination. In the case of specific rules which have a technical basis, the director shall also provide the specific technical basis upon which the director has relied.

In the event that legislative rules promulgated by the director which become effective on or after the first day of July, one thousand nine hundred ninety-four, include new or amended environmental provisions which are less stringent than a counterpart federal rule which recommends, but does not require, a particular standard or any federally recommended environmental standard whether or not there be a counterpart federal rule, the division shall first provide specific written reasons which demonstrate that such provisions are not reasonably necessary to protect, preserve or enhance the quality of West Virginia's environment or human health or safety, taking into consideration the scientific evidence, specific environmental characteristic of West Virginia or an area thereof, or stated legislative findings, policies or purposes relied upon by the director in making such determination. In the case of specific rules which have a technical basis, the director shall also provide the specific technical basis upon which the director has relied.

In the absence of a federal rule, the adoption of a state rule shall not be construed to be more stringent than a federal rule, unless the absence of a federal rule is the result of a specific federal exemption. (1994, c. 61.)

§ 22-1-4. Division of environmental protection; appointment of director.

The division of environmental protection is continued within the department of commerce, labor and environmental resources. The division shall be administered, in accordance with the provisions of this article, under the supervision and direction of the director. (1994, c. 61.)

§ 22-1-5. Jurisdiction vested in division.

Except as may be otherwise provided in this code, the division is hereby designated as the lead regulatory agency for this state for all purposes of

federal legislation relating to all activities regulated under this chapter. (1994, c. 61.)

§ 22-1-6. Director of the division of environmental protection.

(a) The director is the chief executive officer of the division. Subject to section seven [§ 22-1-7] of this article and other provisions of law, the director shall organize the division into such offices, sections, agencies and other units of activity as may be found by the director to be desirable for the orderly, efficient and economical administration of the division and for the accomplishment of its objects and purposes. The director may appoint assistants, hearing officers, clerks, stenographers, and other officers, technical personnel and employees needed for the operation of the division and may prescribe their powers and duties and fix their compensation within amounts appropriated therefor.

(b) The director has the power to and may designate supervisory officers or other officers or employees of the division to substitute for him or her on any board or commission established under this code or to sit in his or her place in any hearings, appeals, meetings or other activities with such substitute having the same powers, duties, authority and responsibility as the director. Additionally, the director has the power to delegate, as he or she considers appropriate, to supervisory officers or other officers or employees of the division his or her powers, duties, authority and responsibility relating to issuing permits, hiring and training inspectors and other employees of the division, conducting hearings and appeals and such other duties and functions set forth in this chapter or elsewhere in this code.

(c) The director has responsibility for the conduct of the intergovernmental relations of the division, including assuring: (1) That the division carries out its functions in a manner which supplements and complements the environmental policies, programs and procedures of the federal government, other state governments, and other instrumentalities of this state; and (2) that appropriate officers and employees of the division consult with individuals responsible for making policy relating to environmental issues in the federal government, other state governments, and other instrumentalities of this state concerning differences over environmental policies, programs and procedures and concerning the impact of statutory law and rules upon the environment of this state.

(d) In addition to other powers, duties and responsibilities granted and assigned to the director by this chapter, the director is hereby authorized and empowered to:

(1) Sign and execute in the name of the state by the "division of environmental protection" any contract or agreement with the federal government or its departments or agencies, subdivisions of the state, corporations, associations, partnerships or individuals: Provided, That the powers granted to the director to enter into agreements or contracts and to make expenditures and

interpreted as authority to exceed the powers heretofore granted by the Legislature to the various commissioners, directors or board members of the various departments, agencies or boards that comprise and are incorporated into each secretary's department pursuant to the provisions of chapter five-f [§ 5F-1-1 et seq.] of this code;

(2) Conduct research in improved environmental protection methods and disseminate information to the citizens of this state;

(3) Enter private lands to make surveys and inspections for environmental protection purposes; to investigate for violations of statutes or rules which the division is charged with enforcing; to serve and execute warrants and processes; to make arrests; issue orders, which for the purposes of this chapter include consent agreements; and to otherwise enforce the statutes or rules which the division is charged with enforcing;

(4) Acquire for the state in the name of the "division of environmental protection" by purchase, condemnation, lease or agreement, or accept or reject for the state, in the name of the division of environmental protection, gifts, donations, contributions, bequests or devises of money, security or property, both real and personal, and any interest in such property;

(5) Provide for workshops, training programs and other educational programs, apart from or in cooperation with other governmental agencies, necessary to insure adequate standards of public service in the division. The director may also provide for technical training and specialized instruction of any employee. Approved educational programs, training and instruction time may be compensated for as a part of regular employment. The director is further authorized to pay out of federal or state funds, or both, as such funds are available, fees and expenses incidental to such educational programs, training, and instruction. Eligibility for participation by employees will be in accordance with guidelines established by the director; and

(6) Issue certifications required under 33 U.S.C. § 1341. Prior to issuing any such certification the director shall solicit from the division of natural resources reports and comments concerning the possible certification. The reports and comments shall be directed from the division of natural resources to the director for consideration.

(e) The director shall be appointed by the governor, by and with the advice and consent of the Senate, and serves at the will and pleasure of the governor: Provided, That in lieu of appointing a director, the governor may order the secretary to directly exercise the powers of the director. The secretary shall designate the order in which other officials of the division shall act for and perform the functions of the secretary or the director during the absence or disability of both the secretary and the director or in the event of vacancies in both of those offices.

(f) At the time of his or her initial appointment, the director shall be at least thirty years old and shall be selected with special reference and consideration given to his or her administrative experience and ability, to his or her demonstrated interest in the effective and responsible regulation of energy industry and the conservation and wise use of natural resources. The director shall have at least a bachelor's degree in a related field and shall have at least

three years of experience in a position of responsible charge in at least one discipline relating to the duties and responsibilities for which the director will be responsible upon assumption of the office of director. The director shall not be a candidate for or hold any other public office, shall not be a member of any political party committee and shall immediately forfeit and vacate his or her office as director in the event he or she becomes a candidate for or accepts appointment to any other public office or political party committee.

(g) The director shall receive an annual salary of sixty-five thousand dollars and shall be allowed and paid necessary expenses incident to the performance of his or her official duties. Prior to the assumption of the duties of his or her office, the director shall take and subscribe to the oath required of public officers prescribed by section five, article four of the constitution of West Virginia and shall execute a bond, with surety approved by the governor, in the penal sum of ten thousand dollars, which executed oath and bond shall be filed in the office of the secretary of state. Premiums on the bond shall be paid from the division funds. (1994, c. 61.)

§ 22-1-7. Offices within division.

Consistent with the provisions of this article the director shall, at a minimum, maintain the following offices within the division:

(1) The office of abandoned mine lands and reclamation, which is charged, at a minimum, with administering and enforcing, under the supervision of the director, the provisions of article two [§ 22-2-1 et seq.] of this chapter;

(2) The office of mining and reclamation, which is charged, at a minimum, with administering and enforcing, under the supervision of the director the provisions of articles three and four [§§ 22-3-1 et seq. and 22-4-1 et seq.] of this chapter;

(3) The office of air quality, which is charged, at a minimum, with administering and enforcing, under the supervision of the director, the provisions of article five [§ 22-5-1 et seq.] of this chapter;

(4) The office of oil and gas, which is charged, at a minimum, with administering and enforcing, under the supervision of the director, the provisions of articles six, seven, eight, nine and ten [§§ 22-6-1 et seq., 22-7-1 et seq., 22-8-1 et seq., 22-9-1 et seq. and 22-10-1 et seq.] of this chapter;

(5) The office of water resources, which is charged, at a minimum, with administering and enforcing, under the supervision of the director, the provisions of articles eleven, twelve, thirteen and fourteen [§§ 22-11-1 et seq., 22-12-1 et seq., 22-13-1 et seq. and 22-14-1 et seq.] of this chapter; and

(6) The office of waste management, which is charged, at a minimum, with administering and enforcing, under the supervision of the director, the provisions of articles fifteen, sixteen, seventeen, eighteen, nineteen and twenty [§§ 22-15-1 et seq., 22-16-1 et seq., 22-17-1 et seq., 22-18-1 et seq., 22-19-1 et seq. and 22-20-1 et seq.] of this chapter. (1994, c. 61.)

§ 22-1-8. Supervisory officers.

(a) The director shall appoint a competent and qualified person to be chief of each office specified in section seven [§ 22-1-7] of this article. The chief is the

principal administrative officer of that office and is accountable and responsible for the orderly and efficient performance of the duties, functions and services of her or his office.

(b) There shall be in the division such other supervisory officers as the director determines is necessary to administer the functions of the division. Such supervisory officers are "administrators" as such term is defined in section two [§ 29-6-2], article six, chapter twenty-nine of this code, notwithstanding the fact that the positions filled by such persons are not statutorily created. Any such supervisory officer may be designated by the director as a deputy director, assistant director, chief, administrator, or other administrative title or designation. Each of the supervisory officers shall be appointed by the director and serve at the will and pleasure of the director. The compensation of such supervisory officers shall be fixed by the director. A single individual may be appointed to serve simultaneously in two distinct supervisory positions, but in a case where such dual appointment is made, such supervisory officer shall not receive additional compensation above that which would be paid for serving in one supervisory position.

(c) A supervisory officer appointed pursuant to the provisions of this section shall report directly to the director and shall, in addition to any functions vested in or required to be delegated to such officer, perform such additional functions as the director may prescribe.

(d) The supervisory officers of the division shall, before entering upon the discharge of their duties, take the oath of office prescribed by section five, article four of the constitution of West Virginia, and shall execute a bond in the penalty of two thousand dollars, with security to be approved by the governor, conditioned upon the faithful discharge of their duties, a certificate of which oath and which bond shall be filed in the office of the secretary of state. Premiums on such bond shall be paid from the division funds. (1994, c. 61.)

§ 22-1-9. Environmental protection advisory council.

(a) There is created within the department of commerce, labor and environmental resources the environmental protection advisory council. The environmental protection advisory council consists of seven members. The director serves as an ex officio member of the council and as its chair. The remaining six members are appointed by the governor. Each member serves for a term of four years and may be reappointed. Of the members of the council first appointed, two shall be appointed for terms ending on the thirtieth day of June, one thousand nine hundred ninety-six, and two each for terms ending one and two years thereafter. Vacancies on the council shall be filled within sixty days after the vacancy occurs.

(b) Two members of the council shall represent industries regulated by the division or their trade associations. Two members shall represent organizations advocating environmental protection. One member shall represent organizations representing local governments. One member shall represent public service districts. In making subsequent appointments this balance of membership shall be maintained.

(c) Appointed members shall be paid the same compensation and expense reimbursement as is paid to members of the Legislature for their interim duties as recommended by the citizens legislative compensation commission and authorized by law for each day or portion thereof engaged in the discharge of official duties.

(d) The council shall meet at least once every quarter and at the call of the chair.

(e) The council shall:

(1) Consult with and advise the director on program and policy development, problem solving and other appropriate subjects;

(2) Identify and define problems associated with the implementation of the policy set forth in section one [§ 22-1-1] of this article;

(3) Provide and disseminate to industry and the public early identification of major federal program and regulatory changes;

(4) Provide a forum for the resolution of conflicts between constituency groups;

(5) To the extent possible, strive for consensus on the development of overall environmental policy; and

(6) Provide an annual report to the joint committee on government and finance on or before the first day of January of each year relating to its findings with regard to the division's performance during the previous year. The report will specifically address the division's performance in accomplishing the nine purposes set forth in subsection (b), section one [§ 22-1-1(b)] of this article. (1994, c. 61.)

§ 22-1-10. Allocation of appropriations and effect on personnel.

(a) The director may, with the exception of the special reclamation fund established in section eleven [§ 22-3-11], article three of this chapter, expend, in accordance with the provisions of chapter five-a [§ 5A-1-1 et seq.] of this code, from special revenue accounts, and funds established pursuant to this chapter and chapters twenty-two-b and twenty-two-c [§§ 22B-1-1 et seq. and 22C-1-1 et seq.] of this code, amounts necessary to implement and administer the general powers, duties and responsibilities of the division of environmental protection: Provided, That federal funds required by law to be expended for a specific purpose may not be expended for any purpose contrary to the laws, rules or regulations of the federal government.

(b) With respect to employees affected by the creation of the division or the transfer of functions and offices to the division the layoff and recall rights of such employees within the classified service of the state as provided in subsections (5) and (6), section ten [§§ 29-6-10(5) and 29-6-10(6)], article six, chapter twenty-nine of this code are limited to the department of commerce, labor and environmental resources and further limited to an occupational group substantially similar to the occupational group established by the classification and compensation plan for the classified service of the agency or board in which the employee was employed: Provided, That the employee has the qualifications established for the job class. The duration of recall rights provided in this subsection is limited to two years or the length of tenure, whichever is less. Except as provided in this subsection, nothing contained in this section abridges the rights of employees within the classified service of the state as provided in sections ten and ten-a, article six, chapter twenty-nine [§§ 29-6-10 and 29-6-10a] of this code.

(c) The director is empowered to authorize the payment of all or any part of the reasonable expenses of employees of the division in moving their household furniture and effects as a result of a reassignment of such employee caused by a transfer of functions or offices to the division. (1994, c. 61.)

§ 22-1-11. Saving provisions.

(a) All orders, determinations, rules, permits, grants, contracts, certificates, licenses, waivers, bonds, authorizations and privileges which have been issued, made, granted, or allowed to become effective by the governor, any state department or agency or official thereof, or by a court of competent jurisdiction, in the performance of functions which have been transferred to the director or to the division, and were in effect on the date such transfer occurred continue in effect, for the benefit of the division, according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with the law by the governor, the secretary, the director, or other authorized official, a court of competent jurisdiction, or by operation of law.

(b) Any proceedings, including notices of proposed rule making, or any application for any license, permit, certificate, or financial assistance pending before any department, division or other office, functions of which were transferred to the division are not affected by the transfer. Orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by the governor, the secretary, the director, by a court of competent jurisdiction, or by operation of law. Nothing in this subsection prohibits the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if the division had not been created or if functions or offices had not been transferred to the division. The director is authorized to propose legislative rules in accordance with the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code for the orderly transfer of proceedings continued under the provisions of this subsection.

(c) Except as provided in subsection (e) of this section, the creation of the division and the subsequent transfer of functions to it do not affect suits commenced prior to the effective date of the creation or any transfer of functions or offices to it, and in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and with like effect as if the creation or transfer had not occurred.

(d) No suit, action or other proceeding commenced by or against any officer in the official capacity of such individual as an officer of the department, division or other office, functions of which were transferred to the division abates by reason of such transfer. No cause of action by or against any

department, division or other office, functions of which were transferred to the division, or by or against any officer thereof in the official capacity of such officer, abates by reason of the transfer.

(e) If, before the transfer, any department, division or other office, or officer thereof in the official capacity of such officer, was a party to a suit, and any function of such department, division or other office, or officer was transferred to the secretary, the director or other officer of the division, then such suit shall be continued with the secretary, the director or other appropriate officer substituted or added as a party. (1994, c. 61.)

§ 22-1-12. Public information.

The division shall collect, organize and from time to time distribute to the public, through news media or otherwise, interesting facts, information and data concerning the state's environment and its environmental regulatory programs. The director may organize and promote lectures, demonstrations, symposiums, schools and other educational programs relating to the state's environment and its protection. Video tapes, motion pictures, slide films and other photographic services may be provided for instruction on the environment and its protection for schools, other governmental agencies, and civic organizations under such rules as may be prescribed by the director.

The director shall select and designate a competent and qualified person as division public information officer, who is responsible for the organization and management of the division's public information and public affairs programs. (1994, c. 61.)

§ 22-1-13. Notification of permitting decisions.

Any person may request the director to notify the person of a decision to issue or deny a specific permit applied for under this chapter. The request must be in writing and received by the director within the public comment period or at a public hearing held for the specific permit application. If there is no public comment period or public hearing held for the specific permit application the director is required to make the notification under this section only if the request for notification is received by the director at least two working days prior to notifying the applicant of the decision. The director shall notify all persons who have made a timely request under this section of the decision on the application at the same time the applicant is notified of the decision. The notification shall advise the person of any appeal rights under this chapter. (1994, c. 61.)

§ 22-1-14. Stream restoration fund; creation; special account; purposes and expenditures.

(a) There is hereby created in the state treasury a special interest bearing account known as the "stream restoration fund." Moneys received by the division pursuant to transfers from any other account lawfully transferred, from the federal government and other sources, from mitigation, moneys from

gifts, bequests, donations and contributions, and other moneys lawfully received from whatever source, may be deposited in the state treasury to the credit of the stream restoration fund.

(b) Expenditures from the fund are not authorized from collections but shall only be authorized by line item appropriation by the Legislature. The moneys are to be used and expended for the restoration and enhancement of the streams and water resources of this state which have been affected by coal mining or acid mine drainage. (1994, c. 61.)

§ 22-1-15. Laboratory certification; rules; fees; revocation and suspension; environmental laboratory certification fund; programs affected; and appeals.

(a) The director shall promulgate rules to require the certification of laboratories conducting waste and wastewater tests and analyses to be used for purposes of demonstrating compliance under the covered statutory programs, including reasonable annual certification fees based upon the type or classification of tests or analyses being conducted by laboratories not to exceed an annual program aggregate of one hundred fifty thousand dollars, to be assessed against laboratory owners or operators in such an amount as is necessary to cover the actual costs of administration of this program and the processing of certification applications, to be deposited in the state environmental laboratory certification fund created pursuant to this section. By the first day of July of each year beginning the first day of July, one thousand nine hundred ninety-five, the director shall provide to the secretary a written report reflecting funds collected, how the funds were expended, and an assessment of the adequacy of the funding to administer the program.

(b) After the effective date of the rules promulgated pursuant to this section, waste and wastewater tests and analyses conducted in laboratories that are not certified for the parameters or toxicity being tested or analyses shall not be accepted by the division, except as otherwise provided, as being in compliance with the requirements, rules or orders of the division issued under authority of one or more of the covered statutory programs: Provided, That field tests and remote monitoring or testing equipment which is conducted or located away from any laboratory shall not be deemed a laboratory for purposes of assessing the fee but shall be subject to such quality assurance and quality control standards as may be established by the director in rules promulgated pursuant to this section. The director shall provide by rule for the granting of certification for laboratories located outside of West Virginia without performance testing or assessment of certification fee pursuant to this section if such laboratories provide written documentation that approval has been received under requirements in another state determined by the director to be equivalent to the West Virginia laboratory certification program. Such reciprocal certification shall be granted only for testing methods and parameters for which the laboratory holds a valid authorization in such other state and only for laboratories in states which allow reciprocity with respect to laboratories located in this state

(c) Application shall be made to the director for approval or certification by laboratories on forms and in a manner prescribed by the director.

(d) Certification shall be renewed on an annual basis. The existing certification shall remain in effect until the director notifies the applicant for renewal that renewal of certification has been granted or denied.

(e) Certification shall be granted for those tests or parameters for which the laboratory demonstrates adequate performance on performance evaluation tests based on the criteria established in rules by the director. The director shall, by rule, establish criteria governing what shall be considered in any decision to deny or issue a certification.

(f) Failure to comply with the requirements of the applicable analytical methods and procedures or standards specified in the rules of the director shall be grounds for revocation or suspension of certification for the affected test procedures or parameters.

(g) No person subject to the covered statutory programs shall be allowed to use data or test results from waste and wastewater tests and analyses conducted at laboratories lacking certification for purposes of demonstrating compliance under the covered statutory programs: Provided, That any person whose data or test results are invalidated because such person had relied upon a laboratory which loses its certification, shall be granted thirty days after notice thereof by the director during which data or test results may be repeated or reanalyzed by a certified laboratory for purposes of demonstrating compliance under the covered statutory programs.

(h) A special revenue fund designated the "environmental laboratory certification fund" shall be established in the state treasury on the first day of July, one thousand nine hundred ninety-four. The net proceeds of all fees collected pursuant to this section shall be deposited in the environmental laboratory certification fund. Upon line item appropriation by the Legislature, the director shall expend the proceeds of the environmental laboratory certification fund solely for the administration of the requirements of this section: Provided, That for fiscal year one thousand nine hundred ninety-five, expenditures are permitted from collection without further appropriation by the Legislature.

(i) For purposes of this section, "covered statutory program" means one of the regulatory programs developed under statutory authority of one of the following acts of the Legislature: Water Pollution Control Act, article eleven [§ 22-11-1 et seq.] of this chapter; Hazardous Waste Management Act, article eighteen [§ 22-18-1 et seq.] of this chapter; Hazardous Waste Emergency Response Fund Act, article nineteen [§ 22-19-1 et seq.] of this chapter; Underground Storage Tank Act, article seventeen [§ 22-17-1 et seq.] of this chapter; the Solid Waste Management Act, article fifteen [§ 22-15-1 et seq.] of this chapter; or the Groundwater Protection Act, article twelve [§ 22-12-1 et seq.] of this chapter.

(j) Any person adversely affected by an order or action by the director pursuant to this section, or aggrieved by the failure or refusal of the director to act within a reasonable time, or by the action of the director in granting or denying a certification or renewal thereof, may appeal to the environmental quality board pursuant to article one [§ 22B-1-1 et seq.], chapter twenty-two-b of this code.

(k) The provisions of this section shall apply only to tests and analyses of waste or wastewater subject to regulation by the division of environmental protection. The provisions of this section do not apply to tests or analyses of potable or drinking water. (1994, c. 61.)

ARTICLE 1A.

PRIVATE REAL PROPERTY PROTECTION.

§ 22-1A-1. Short title.

This article shall be known and may be cited as the "Private Real Property Protection Act". (1994, c. 61.)

§ 22-1A-2. Legislative findings and purpose.

It is the policy of this state that action by the division of environmental protection affecting private real property is subject to such protection as is afforded by the constitutions of the United States and of West Virginia and the principles of nuisance law. The Legislature intends that the division of environmental protection follow certain procedures to ensure constitutional protection of private real property rights, while also meeting its obligation to protect the quality of the environment, and reduce the burden on citizens, local governments and this state caused by certain actions affecting private real property. The purpose of this article is to establish an orderly, consistent process that better enables the division to evaluate how potential administrative action by it may affect privately owned real property. It is not the purpose of this article to reduce or expand the scope of private real property protections provided in section nine, article three of the constitution of West Virginia and the fifth and fourteenth amendments of the constitution of the United States, as those provisions have been and may in the future be interpreted by the state and federal courts of competent jurisdiction with respect to such matters for this state. (1994, c. 61.)

§ 22-1A-3. Actions by division of environmental protection; requirement for assessment.

(a) Whenever the division of environmental protection considers action within its statutory authority that is reasonably likely to deprive a real property owner of his or her property in fee simple or to deprive an owner of all

productive use of his or her private real property, it shall prepare an assessment that includes, but need not be limited to, the following:

(1) An identification of the risk created by the private real property use, and a description of the environmental, health, safety, or other benefit to be achieved by the proposed action;

(2) The anticipated effects, if any, on other real property owners or on the environment if the division does not take the proposed action;

(3) An explanation of how the division believes its action advances the purpose of protecting against the risk;

(4) The reasons that the division believes that its action is likely to result in requiring the state, under applicable constitutional principles and case law, to compensate the owner of private real property, including a description of how the action affects the use or value of private real property;

(5) Alternatives, if any, to the proposed action that the division believes will fulfill the legal obligations of the division, reduce the impact on the private real property owner and reduce the likelihood of requiring compensation; and

(6) An estimate of the cost to the state for compensation in the event such compensation is required.

No assessment is required under this article, unless the West Virginia Supreme Court of Appeals or the United State Supreme Court has under similar factual circumstances required compensation to be paid.

(b) In the case of an immediate threat to human health and safety that constitutes an emergency and requires an immediate response, the assessment required by this section may be delayed until after the emergency response is completed.

(c) The following do not require an assessment under this section:

(1) Licensing or permitting conditions, requirements or limitations to the use of private real property pursuant to any applicable state or federal statutes, rules or regulations; or

(2) Rules and emergency rules of the division that are reasonably likely to limit the use of private real property pursuant to any applicable state or federal statutes, rules or regulations; or

(3) Enforcement actions undertaken by the division pursuant to any applicable state or federal statutes, rules or regulations. (1994, c. 61.)

§ 22-1A-4. Buffer zones.

(a) Prior to the division of environmental protection requiring that a buffer zone be created on private real property, the division shall prepare a report which shall identify the public purpose or policy which is to be served by the creation of the buffer zone and how the creation and maintenance of the buffer zone promotes or fulfills that public purpose or policy. This report is in addition to any other assessment required pursuant to the provisions of this article.

(b) Any report made pursuant to this section is public information.

(c) In the case of an immediate threat to human health and safety that constitutes an emergency and requires an immediate response, the report required by this section may be delayed until after the emergency response is

§ 22-1A-5. Remedies.

When a court of competent jurisdiction determines that action of the division of environmental protection, within its statutory authority, requires that compensation be paid to a private real property owner pursuant to section nine, article three of the constitution of West Virginia, or the fifth or fourteenth amendments of the constitution of the United States or the principles of nuisance law, the private real property owner is also entitled to his or her reasonable attorney fees and costs:

(1) If the court determines that the division failed to perform the assessment required in section three [§ 22-1A-3] of this article; or

(2) If the court determines that the division performed the assessment required in section three of this article but failed to conclude that its action was reasonably likely to require compensation to be paid to the private real property owner. (1994, c. 61.)

§ 22-1A-6. Scope of application.

The provisions of this article only apply to the programs administered by the division of environmental protection on the effective date of this article. (1994, c. 61.)

Editor's notes. — This section contains a reference to "the effective date of this article." Acts 1994, c. 61 provided that this article take effect June 10, 1994.

ARTICLE 2.

ABANDONED MINE LANDS AND RECLAMATION ACT.

Editor's notes. — Acts 1994, c. 61 amended and reenacted this article, substituting present §§ 22-2-1 to 22-2-9 for former §§ 22-2-1 to 22-2-3 (enacted by Acts 1985, c. 77), concerning the interstate mining compact. The new provisions are sufficiently different from former §§ 22-2-1 to 22-2-3 that a detailed explanation of the changes and the retention of historical citations from the former laws were impracticable.

Michie's Jurisprudence. — See generally 13A M.J., Mines and Minerals.

W. Va. Law Review. — Flannery and Poland, "Hazardous Waste Management Act — Closing the Circle," 84 W Va. L. Rev. 347 (1982).

Retroactivity. — The provisions of former § 20-6D-25, which were similar to those in this section, were not applied retroactively to an action filed six years prior to the effective date of that section. Reynolds v. Pardee & Curtin Lumber, 172 W. Va. 804, 310 S.E.2d 870 (1983).

§ 22-4-23. Validity and construction of existing surface-mining permits.

Any valid surface-mining permit existing on the effective date of this article shall remain in full force and effect until such permit expires under its terms or is otherwise terminated under the provisions of this article. The provisions of this section do not require the regrading or replanting of any area on which such work was satisfactorily performed prior to the effective date of this article. (1994, c. 61.)

Editor's notes. — This section contains a reference to "the effective date of this article." Acts 1994, c. 61, which amended and reenacted this article, passed on March 12, 1994 and became effective ninety days from passage.

ARTICLE 5.

AIR POLLUTION CONTROL.

Editor's notes. — Acts 1994, c. 61 amended and reenacted this article substituting present §§ 22-5-1 to 22-5-16 for former §§ 22-5-1 and 22-5-2 (enacted by Acts 1985, c. 77, and amended by Acts 1986, c. 107; and 1993, c. 91) concerning the board of appeals. The new provisions are sufficiently different from former §§ 22-5-1 and 22-5-2 that a detailed explanation of the changes and the retention of historical citations from the former laws were impracticable.

§ 22-5-1. Declaration of policy and purpose.

It is hereby declared to be the public policy of this state and the purpose of this article to achieve and maintain such levels of air quality as will protect human health and safety, and to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the economic and social development of this state and facilitate the enjoyment of the natural attractions of this state.

To these ends it is the purpose of this article to provide for a coordinated statewide program of air pollution prevention, abatement and control; to facilitate cooperation across jurisdictional lines in dealing with problems of air pollution not confined within single jurisdictions; and to provide a framework within which all values may be balanced in the public interest.

Further, it is the public policy of this state to fulfill its primary responsibility for assuring air quality pursuant to the "Federal Clean Air Act," as amended. (1994, c. 61.)

Editor's notes. — The Federal Clean Air Act, referred to in this section, is codified as 42 U.S.C. § 7401 et seq.

W. Va. Law Review. — Flannery and Poland, "Hazardous Waste Management Act — Closing the Circle," 84 W. Va. L. Rev. 347 (1982).

Malley, "Acid Rain: A Decade of Footdragging May Be Coming to an End," 91 W. Va. L. Rev. 817 (1989).

Teague, Lerner, Schulze, Fichthorn, "The Debate Over the Adequacy of the United States Approach to Acid Deposition: The Electric Utility Industry Perspective," 91 W. Va. L. Rev. 845 (1989).

The control of air pollution is a legitimate legislative function under the police power. Op. Att'y Gen., Feb. 1, 1980, No. 49.

Basis of authority. — Provisions of this article serve as a basis for the authority needed by the air pollution control commission. Op. Att'y Gen., Nov. 30, 1973.

§ 22-5-2. Definitions.

The terms used in this article are defined as follows:

(1) "Air pollutants" means solids, liquids or gases which, if discharged into the air, may result in a statutory air pollution.

(2) "Board" means the air quality board continued pursuant to the provisions of article two [§ 22B-2-1 et seq.], chapter twenty-two-b of this code.

(3) "Director" means the director of the division of environmental protection or such other person to whom the director has delegated authority or duties pursuant to sections six or eight [§ 22-1-6 or § 22-1-8], article one, chapter twenty-two of this code.

(4) "Discharge" means any release, escape or emission of air pollutants into the air.

(5) "Person" means any and all persons, natural or artificial, including the state of West Virginia or any other state, the United States of America, any municipal, statutory, public or private corporation organized or existing under the laws of this or any other state or country, and any firm, partnership or association of whatever nature.

(6) "Statutory air pollution" means and is limited to the discharge into the [illegible] organic or inorganic)

animal or plant life, or property, or which would interfere with the enjoyment of life or property. (1994, c. 61.)

§ 22-5-3. Causing statutory pollution unlawful; article not to provide persons with additional legal remedies.

It is unlawful for any person to cause a statutory air pollution, to violate the provisions of this article, to violate any rules promulgated pursuant to this article to operate any facility subject to the permit requirements of the director without a valid permit, or to knowingly misrepresent to any person in the state of West Virginia that the sale of air pollution control equipment will meet the standards of this article or any rules promulgated pursuant to this article. Nothing contained in this article provides any person with a legal remedy or basis for damages or other relief not otherwise available to such person immediately prior to enactment of this article. (1994, c. 61.)

§ 22-5-4. Powers and duties of director; and legal services; rules.

(a) The director is authorized:

(1) To develop ways and means for the regulation and control of pollution of the air of the state;

(2) To advise, consult and cooperate with other agencies of the state, political subdivisions of the state, other states, agencies of the federal government, industries, and with affected groups in furtherance of the declared purposes of this article;

(3) To encourage and conduct such studies and research relating to pollution and its control and abatement as the director may deem advisable and necessary;

(4) To promulgate legislative rules in accordance with the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code not inconsistent with the provisions of this article, relating to the control of air pollution: Provided, That no rule of the director shall specify a particular manufacturer's product, nor a single specific type of construction nor a particular method of compliance: Provided, however, That no legislative rule or program except as specifically required by the "Federal Clean Air Act" hereafter adopted shall be any more stringent than any federal law: Provided further, That in the event the director first makes a written finding based upon reliable evidence that to the limited extent that the director finds that there exists scientifically any such departure from the provisions of this article such rule or program reflecting factors unique to West Virginia or some area thereof;

(5) To enter orders requiring compliance with the provisions of this article and the rules lawfully promulgated hereunder, to administer oaths, make promulgation of rules and the

(6) To consider complaints, subpoena witnesses, investigations and hold hearings relevant

(7) To encourage voluntary cooperation by municipalities, counties, industries and others in preserving the purity of the air within the state;

(8) To employ personnel, including specialists and consultants, purchase materials and supplies, and enter into contracts necessary, incident or convenient to the accomplishment of the purpose of this article;

(9) To enter and inspect any property, premise or place on or at which a source of air pollutants is located or is being constructed, installed or established at any reasonable time for the purpose of ascertaining the state of compliance with this article and rules promulgated under the provisions of this article. No person shall refuse entry or access to any authorized representative of the director who requests entry for purposes of inspection, and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with any such inspection: Provided, That nothing contained in this article eliminates any obligation to follow any process that may be required by law;

(10) Upon reasonable evidence of a violation of this article, which presents an imminent and serious hazard to public health, to give notice to the public or to that portion of the public which is in danger by any and all appropriate means;

(11) To cooperate with, receive and expend money from the federal government and other sources; and the director may cooperate with any public or private agency or person and receive therefrom and on behalf of the state gifts, donations, and contributions, which shall be deposited to the credit of the "Air Pollution Education and Environment Fund" which is hereby continued in the state treasury. The moneys collected pursuant to this article which are directed to be deposited in the air pollution education and environment fund must be deposited in a separate account in the state treasury and expenditures for purposes set forth in this article are not authorized from collection but are to be made only in accordance with appropriation and in accordance with the provisions of article three [§ 12-3-1 et seq.], chapter twelve of this code and upon fulfillment of the provisions set forth in article two [§ 5A-2-1 et seq.], chapter five-a of this code. Amounts collected which are found from time to time to exceed the funds needed for the purposes set forth in this article may be transferred to other accounts or funds and redesignated for other purposes by appropriation of the Legislature;

(12) To represent the state in any and all matters pertaining to plans, procedures and negotiations for interstate compacts in relation to the control of air pollution;

(13) To appoint advisory councils from such areas of the state as he or she may determine. The members shall possess some knowledge and interest in matters pertaining to the regulation, control and abatement of air pollution. The council may advise and consult with the director about all matters pertaining to the regulation, control and abatement of air pollution within such

(14) require any and all persons who are directly or indirectly discharging air utants into the air to file with the director such information as form or manner prescribed by him or her for such

outlets, processes employed, fuels used and the nature and time periods of duration of discharges. Such information shall be filed with the director, when and in such reasonable time, and in such manner as the director may prescribe;

(15) To require the owner or operator of any stationary source discharging air pollutants to install such monitoring equipment or devices as the director may prescribe and to submit periodic reports on the nature and amount of such discharges to the director;

(16) To do all things necessary and convenient to prepare and submit a plan or plans for the implementation, maintenance and enforcement of the "Federal Clean Air Act," as amended: Provided, That in preparing and submitting each such plan the director shall establish in such plan that such standard shall be first achieved, maintained and enforced by limiting and controlling emissions of pollutants from commercial and industrial sources and locations and shall only provide in such plans for limiting and controlling emissions of pollutants from private dwellings and the curtilage thereof as a last resort: Provided, however, That nothing herein contained affects plans for achievement, maintenance and enforcement of motor vehicle emission standards and of standards for fuels used in dwellings;

(17) To promulgate legislative rules, in accordance with the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code, providing for the following:

(A) Procedures and requirements for permit applications, transfers and modifications and the review thereof;

(B) Imposition of permit application and transfer fees;

(C) Establishment of criteria for construction, modification, relocation and operating permits;

(D) Imposition of permit fees and of certificate fees: Provided, That any person subject to operating permit fees pursuant to section twelve of this article is exempt from imposition of the certificate fee; and

(E) Imposition of penalties and interest for the nonpayment of fees.

The fees, penalties and interest shall be deposited in a special account in the state treasury designated the "Air Pollution Control Fund", formerly the "Air Pollution Control Commission Fund", which is hereby continued to be appropriated for the sole purpose of paying salaries and expenses of the board, the office of air quality and their employees to carry out the provisions of this article: Provided, That the fees, penalties and interest collected for operating permits required by section twelve [§ 22-5-12] of this article shall be expended solely to cover all reasonable direct and indirect costs required to administer the operating permit program. The fees collected pursuant to this subdivision must be deposited in a separate account in the state treasury and expenditures for purposes set forth in this article are not authorized from collections but are to be made only in accordance with appropriation and in accordance with the provisions of article three [§ 12-3-1 et seq.], chapter twelve of this code and upon fulfillment of the provisions set forth in article two [§ et seq.], chapter five-a of this code. Amounts collected which are fo time to time to exceed the funds needed for the purposes set forth in this article may

be transferred to other accounts or funds and redesignated for other purposes by appropriation of the Legislature: Provided, however, That for fiscal year one thousand nine hundred ninety-three, expenditures are permitted from collections without appropriation by the Legislature; and

(18) Receipt of any money by the director as a result of the entry of any consent order shall be deposited in the state treasury to the credit of the air pollution education and environment fund.

(b) The attorney general and his or her assistants and the prosecuting attorneys of the several counties shall render to the director without additional compensation such legal services as the director may require of them to enforce the provisions of this article. (1994, c. 61.)

Editor's notes. — The Federal Clean Air Act, referred to in (a)(16), is codified as 42 U.S.C. § 7401 et seq.

Texthooks. — Administrative Law in West Virginia (Neely), §§ 4.07, 5.16.

W. Va. Law Review. — Flannery and Poland, "Hazardous Waste Management Act — Closing the Circle," 84 W. Va. L. Rev. 347 (1982).

Federal Clean Air Act intended as comparative base for regulations. — The Federal Clean Air Act, 42 U.S.C. § 7401 et seq., as amended, was intended to be the comparative base for the commission's regulations, rules or standards, etc., under § 16-20-5(4). Op. Att'y Gen., Nov. 15, 1979.

Stringency of regulations limited by federal standards. — The commission cannot regulate sources more stringently than applicable Environmental Protection Agency (EPA) prevent significant deterioration (PSD) requirements, new source performance standards or Standards for Hazardous Air Pollutants (NESHAP) regulations unless necessary to attain and maintain ambient air quality standards. Op. Att'y Gen., Nov. 15, 1979.

The commission can regulate existing sources as stringently as it desires. Op. Att'y Gen., Nov. 15, 1979.

When the commission regulates a source which has two differing federal requirements, the commission can regulate as stringently as the stricter federal requirement. Op. Att'y Gen., Nov. 15, 1979.

Regulation of new sources in attainment areas. — The commission can regulate new sources in attainment areas in the same way as it regulates sources in nonattainment areas. Op. Att'y Gen., Nov. 15, 1979.

The first proviso of former § 16-20-5(4), see now this section, means that the commission could not require a pollution source to: (1) install a particular manufacturer's equipment to the exclusion of all other, (2) use a specific type of construction, or (3) use a particular method of compliance to the exclusion of all others to comply with the commission's amended, specifically requires it. Op. Att'y Gen., Nov. 15, 1979.

The second proviso of subdivision (4) is applicable only when the federal government has a rule, regulation, program, plan or standard for the same source which the commission will regulate. Op. Att'y Gen., Nov. 15, 1979.

A commission regulation permitting certain pollution sources to "bank" their excess emission offset credits was a reasonable regulation within the commission's authority under subdivision (1), and reasonably related to the purpose of the legislative enactment. Op. Att'y Gen., Feb. 1, 1980, No. 49.

The provision of subdivision (4) that no commission rule be more stringent than the federal regulations was met by a rule permitting, for two years only, the "banking" by pollution sources of excess emission offset credits, because federal regulations would permit the State to prohibit such banking altogether. Op. Att'y Gen., Feb. 1, 1980, No. 49.

Municipality may not enforce conflicting local laws. — The city of Wheeling, in the absence of an express grant of the State, may not enforce local laws which are in conflict with or inconsistent with the general laws or statutes of the State and, therefore, would be prohibited from enforcing provisions of a local ordinance relating to emission standards which are either less restrictive or more restrictive than the emission standards established by the West Virginia air pollution control commission. Op. Att'y Gen., Mar. 30, 1972.

A second public hearing or a continuance of a public hearing can be held at the discretion of the air pollution control commission after compliance with applicable laws as to notice, and if neither the request for a second public hearing nor a request for a continuance of the first public hearing are granted, then any discussion as to regulations or proposed regulations, not the subject of the public hearing, is proper only as such discussion concerns the proposed regulation for which the public hear-

Commission regulation found valid under this section. — The requirement of a compliance program and schedule found in section 8 of the air pollution control commission regulation II (1972) is found to be valid and reasonable under this section. Op. Att'y Gen., Mar. 12, 1973.

Review of complex sources authorized. — This section authorizes the promulgation by the West Virginia air pollution control commission of a regulation requiring review of complex sources as to their direct and indirect effects. Op. Att'y Gen., Nov. 30, 1973.

And is necessary and convenient to the preparation and submission of a plan for the implementation, maintenance and enforcement of air quality standards. Op Att'y Gen., Nov. 30, 1973.

§ 22-5-5. Issuance of cease and desist orders by director; service; permit suspension, modification and revocation; appeals to board.

If, from any investigation made by the director or from any complaint filed with him or her, the director is of the opinion that a person is violating the provisions of this article, or any rules promulgated pursuant thereto, he or she shall make and enter an order directing such person to cease and desist such activity. The director shall fix a reasonable time in such order by which such activity must stop or be prevented. The order shall contain the findings of fact upon which the director determined to make and enter such order.

If, after any investigation made by the director, or from any complaint filed with him or her, the director is of the opinion that a permit holder is violating the provisions of this article, or any rules promulgated pursuant thereto, or any order of the director, or any provision of a permit, the director may issue notice of intent to suspend, modify or revoke and reissue such permit. Upon notice of the director's intent to suspend, modify or revoke a permit, the permit holder may request a conference with the director to show cause why the permit should not be suspended, modified or revoked. The request for conference must be received by the director within fifteen days following receipt of notice. After conference or fifteen days after issuance of notice of intent, if no conference is requested, the director may enter an order suspending, modifying or revoking the permit and send notice to the permit holder. Such order is a cease and desist order for purposes of administrative and judicial review and shall contain findings of fact upon which the director determined to make and enter such order. If an appeal of the director's order is filed, the order of the director shall be stayed from the date of issuance pending a final decision of the board.

The director shall cause a copy of any such order to be served upon such person by registered or certified mail or by any proper law-enforcement officer.

Any person upon whom a copy of such final order has been served may appeal such order to the air quality board pursuant to the provisions of article one [§ 22B-1-1 et seq.], chapter twenty-two-b of this code. (1994, c. 61.)

§ 22-5-6. Penalties; recovery and disposition; duties of prosecuting attorneys.

(a) Any person who violates any provision of this article, any permit or any rule or order issued pursuant to this article or article one [§ 22B-1-1 et seq.],

chapter twenty-two-b of this code is subject to a civil penalty not to exceed ten thousand dollars for each day of such violation, which penalty shall be recovered in a civil action brought by the director in the name of the state of West Virginia in the circuit court of any county wherein such person resides or is engaged in the activity complained of or in the circuit court of Kanawha County. The amount of the penalty shall be fixed by the court without a jury: Provided, That any such person is not subject to such civil penalties unless such person has been given written notice thereof by the director: Provided, however, That for the first such minor violation, if such person corrects the violation within such time as was specified in the notice of violation issued by the director, no such civil penalty may be recovered: Provided further, That if such person fails to correct such minor violation or for any serious or subsequent serious or minor violation, such person is subject to civil penalties imposed pursuant to this section from the first day of such violation notwithstanding the date of the issuance or receipt of the notice of violation. The director shall, by rule subject to the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code, determine the definitions of serious and minor violations. The amount of any such penalty collected by the director shall be deposited in the general revenue of the state treasury according to law.

(b) (1) Any person who knowingly misrepresents any material fact in an application, record, report, plan or other document filed or required to be maintained under the provisions of this article or any rules promulgated under this article is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than twenty-five thousand dollars or imprisoned in the county jail not more than six months or both fined and imprisoned.

(2) Any person who knowingly violates any provision of this article, any permit or any rule or order issued pursuant to this article or article one [§ 22B-1-1 et seq.], chapter twenty-two-b of this code is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than twenty-five thousand dollars for each day of such violation or imprisoned in the county jail not more than one year or both fined and imprisoned.

(c) Upon a request in writing from the director it is the duty of the attorney general and the prosecuting attorney of the county in which any such action for penalties accruing under this section or section seven [§ 22-5-7] of this article may be brought to institute and prosecute all such actions on behalf of the director.

(d) For the purpose of this section, violations on separate days are separate offenses. (1994, c. 61.)

§ 22-5-7. Applications for injunctive relief.

The director may seek an injunction against any person in violation of any provision of this article or any permit, rule or order issued pursuant to this article or article one [§ 22B-1-1 et seq.], chapter twenty-two-b of this code. In seeking an injunction, it is not necessary for the director to post bond or allege or prove at any stage of the proceeding that irreparable damage will result or that the remedy at law is inadequate. An application for injunctive relief brought under this section or for civil penalty brought under section six [§ 22-5-6] of this article may be filed and relief granted notwithstanding the fact that all administrative remedies provided in this article have not been exhausted or invoked against the person or persons against whom such relief is sought.

In any action brought pursuant to the provisions of section six or of this section, the state, or any agency of the state which prevails, may be awarded costs and reasonable attorney's fees. (1994, c. 61.)

Rules of Civil Procedure. — Injunctions, Rule 65.

§ 22-5-8. Emergencies.

Whenever air pollution conditions in any area of the state become such as, in the opinion of the director, to create an emergency and to require immediate action for the protection of the public health, the director may, with the written approval of the governor, so find and enter such order as it deems necessary to reduce or prevent the emission of air pollutants substantially contributing to such conditions. In any such order the director shall also fix a time, not later than twenty-four hours thereafter, and place for a hearing to be held before it for the purpose of investigating and determining the factors causing or contributing to such conditions. A true copy of any such order shall be served upon persons whose interests are directly prejudiced thereby in the same manner as a summons in a civil action may be served, and a true copy of such order shall also be posted on the front door of the courthouse of the county in which the alleged conditions originated. All persons whose interests are prejudiced or affected in any manner by any such order shall have the right to appear in person or by counsel at the hearing and to present evidence relevant to the subject of the hearing. Within twenty-four hours after completion of the hearing the director shall affirm, modify or set aside said order in accordance and consistent with the evidence adduced. Any person aggrieved by such action of the director may thereafter apply by petition to the circuit court of the county for a review of the director's action. The circuit court shall forthwith fix a time for hearing de novo upon the petition and shall, after such hearing, by order entered of record, affirm, modify or set aside, in whole or in part, the order and action of the director. Any person whose interests shall have been substantially affected by the final order of the circuit court may appeal the same to the supreme court of appeals in the manner prescribed by law. (1994, c. 61.)

§ 22-5-9. Powers reserved to secretary of the department of health and human resources, commissioner of bureau of public health, local health boards and political subdivisions; conflicting statutes repealed.

Nothing in this article affects or limits the powers or duties heretofore conferred by the provisions of chapter sixteen [§ 16-1-1 et seq.] of this code upon the the secretary of the department of health and human resources, the commissioner of the bureau of public health, county health boards, county health officers, municipal health boards, municipal health officers, combined boards of health or any other health agency or political subdivision of this state except insofar as such powers and duties might otherwise apply to the control, reduction or abatement of air pollution. All existing statutes or parts of statutes are, to the extent of their inconsistencies with the provisions of this article and to the extent that they might otherwise apply to the control, reduction or abatement of air pollution, hereby repealed: Provided, That no ordinance previously adopted by any municipality relating to the control, reduction or abatement of air pollution is repealed by this article. (1994, c. 61.)

County commissions without authority. — No provision of law specifically authorizes county courts (now county commissions) to engage in any activities relating to air pollution. Op. Att'y Gen., Oct. 20, 1972.

§ 22-5-10. Records, reports, data or information; confidentiality; proceedings upon request to inspect or copy.

All air quality data, emission data, permits, compliance schedules, orders of the director, board orders and any other information required by a federal implementation program (all for convenience hereinafter referred to in this section as "records, reports, data or information") obtained under this article shall be available to the public, except that upon a showing satisfactory to the director, by any person, that records, reports, data or information or any particular part thereof, to which the director has access under this article if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the director shall consider such records, reports, data or information or such particular portion thereof confidential: Provided, That such confidentiality does not apply to the types and amounts of air pollutants discharged and and that such records, reports, data or information may be disclosed to other officers, employees or authorized representatives of the state or of the federal environmental protection agency concerned with enforcing this article, the federal Clean Air Act, as amended, or the federal Resource Conservation and Recovery Act, as amended, when relevant to any official proceedings thereunder: Provided, however, That such officers, employees or authorized representatives of the state or federal environmental protection agency protect such records, reports, data or information to the ... The director shall promulgate legislative rules regarding the protection of records, reports, data or information, or trade secrets, as required by this section.

All requests to inspect or copy documents must state with reasonable specificity the documents or type of documents sought to be inspected or copied. Within five business days of the receipt of such a request, the director or his or her designate shall: (a) Advise the person making such request of the time and place at which the person may inspect and copy the documents; or (b) deny the request, stating in writing the reasons for such denial. For purposes of judicial appeal, a written denial by the director shall be deemed an exhaustion of administrative remedies. Any person whose request for information is denied, in whole or in part, may appeal from such denial by filing with the director a notice of appeal. Such notice shall be filed within thirty days from the date the request for information was denied, and shall be signed by the person whose request was denied or the person's attorney. The appeal shall be taken to the circuit court of Kanawha County, where it shall be heard without a jury. The scope of review is limited to the question of whether the records, reports, data or other information, or any particular part thereof (other than emission data), sought to be inspected or copied, would, if made public, divulge methods or processes entitled to protection as trade secrets. The said court shall make findings of fact and conclusions of law based upon the evidence and testimony. The director, the person whose request was denied, or any other person whose interest has been substantially affected by the final order of the circuit court may appeal to the supreme court of appeals in the manner prescribed by law. (1994, c. 61.)

§ 22-5-11. Construction, modification or relocation permits required for stationary sources of air pollutants.

No person shall construct, modify or relocate any stationary source of air pollutants without first obtaining a construction, modification or relocation permit as provided in this section.

The director shall by rule specify the class or categories of stationary sources to which this section applies. Application for permits shall be made upon such form, in such manner, and within such time as the rule prescribes and shall include such information, as in the judgment of the director, will enable him or her to determine whether such source will be so designed as to operate in conformance with the provisions of this article or any rules of the director.

The director shall, within a reasonable time not to exceed twelve months for major sources, as defined by the director, and six months for all other sources after the receipt of a complete application, issue such permit unless he or she determines that the proposed construction, modification or relocation will not be in accordance with this article or rules promulgated thereunder, in which case the director shall issue an order for the prevention of such construction, modification or relocation. For the purposes of this section, a modification is deemed to be any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant discharged by such source above a de minimis level set by the director. (1994, c. 61.)

W. Va. Law Review. — Wakefield, "Problems Associated With the Management of Solid Wastes: Is There a Solution in the Offing?" 83 W. Va. L. Rev. 131 (1980).

The phrase, "stationary source of air pollutants," can include stationary sources which will have both direct and indirect (associated mobile-source) pollution effects. Op. Att'y Gen., Nov. 30, 1973.

Authority to regulate construction of complex sources. — This section would empower the West Virginia air pollution control commission to review and prevent construction of complex sources, provided the appropriate regulation is promulgated. Op. Att'y Gen., Nov. 30, 1973.

A conditional construction permit cannot be used as a substitute for providing sufficient information in an application, but conditions can be made a part of a granted permit in order to insure that the applicant is proceeding according to information in the application. Op. Att'y Gen., April 3, 1974.

Conditional construction permits cannot be issued by the director, unless the director can make a present determination through information supplied only in the application that such source will be so designed as to operate in conformance with the provisions of chapter 16, article 20, or any rules and regulations promulgated thereunder. Op. Att'y Gen., April 3, 1974.

§ 22-5-12. Operating permits required for stationary sources of air pollution.

No person may operate a stationary source of air pollutants without first obtaining an operating permit as provided in this section. The director shall promulgate legislative rules, in accordance with chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code, which specify classes or categories of stationary sources which are required to obtain an operating permit. The legislative rule shall provide for the form and content of the application procedure including time limitations for obtaining the required permits. Any person who has filed a timely and complete application for a permit or renewal thereof required by this section, and who is abiding by the requirements of this article and the rules promulgated pursuant thereto is in compliance with the requirements of this article and any rule promulgated thereunder until a permit is issued or denied. Any legislative rule promulgated pursuant to the authority granted by this section shall be equivalent to and consistent with rules and regulations adopted by the administrator of United States environmental protection agency pursuant to Title IV and Title V of the Clean Air Act Amendments of 1990, 42 U.S.C. § 7651 et seq. and 42 U.S.C. § 7661 et seq., respectively: Provided, That such legislative rule may deviate from the federal rules and regulations where a deviation is appropriate to implement the policy and purpose of this article taking into account such factors unique to West Virginia. (1994, c. 61.)

§ 22-5-13. Consolidation of permits.

For permits required by sections eleven and twelve [§§ 22-5-11 and 22-5-12] of this article, the director may incorporate the required permits with an existing permit or consolidate the required permits into a single permit. (1994, c. 6

§ 2. .4. Administrative review of permit actions.

may be affected including, but not necessari

comment process, by a permit issued, modified or denied by the director may appeal such action of the director to the air quality board pursuant to article one [§ 22B-1-1 et seq.], chapter twenty-two-b of this code. (1994, c. 61.)

§ 22-5-15. Motor vehicle pollution, inspection and maintenance.

(a) As the state of knowledge and technology relating to the control of emissions from motor vehicles may permit or make appropriate, and in furtherance of the purposes of this article, the director may provide by legislative rule for the control of emissions from motor vehicles. Such legislative rule may prescribe requirements for the installation and use of equipment designed to reduce or eliminate emissions and for the proper maintenance of such equipment and of vehicles. Any legislative rule pursuant to this section shall be consistent with provisions of federal law, if any, relating to control of emissions from the vehicles concerned. The director shall not require, as a condition precedent to the initial sale of a vehicle or vehicular equipment, the inspection, certification or other approval of any feature or equipment designed for the control of emissions from motor vehicles, if such feature or equipment has been certified, approved, or otherwise authorized pursuant to federal law.

(b) Except as permitted or authorized by law or legislative rule, no person shall fail to maintain in good working order or remove, dismantle or otherwise cause to be inoperative any equipment or feature constituting an operational element of the air pollution control system or mechanism of a motor vehicle required by rules of the director to be maintained in or on the vehicle. Any such failure to maintain in good working order or removal, dismantling or causing of inoperability subjects the owner or operator to suspension or cancellation of the registration for the vehicle by the department of transportation, division of motor vehicles. The vehicle is not thereafter eligible for registration until all parts and equipment constituting operational elements of the motor vehicle have been restored, replaced or repaired and are in good working order.

(c) The department of transportation, division of motor vehicles, department of administration, information and communication services division, and the department of public safety shall make available technical information and records to the director to implement the legislative rule regarding motor vehicle pollution, inspection and maintenance. The director shall promulgate a legislative rule establishing motor vehicle pollution, inspection and maintenance standards and imposing an inspection fee at a rate sufficient to implement the motor vehicle inspection program.

(d) The director shall promulgate a legislative rule requiring maintenance of features of equipment in or on motor vehicles for the purpose of controlling emissions therefrom, and no motor vehicle may be issued a division of motor vehicles registration certificate, or the existing registration certificate shall be revoked, unless the motor vehicle has been found to be in compliance with the director's legislative rule.

(e) The remedies and penalties provided in this section a on one chapter seventeen-a of this code, apply to violations

hereof, and the provisions of sections six or seven [§ 22-5-6 or § 22-5-7] of this article do not apply thereto.

(f) As used in this section "motor vehicle" has the same meaning as in chapter seventeen-c [§ 17C-1-1 et seq.] of this code. (1994, c. 61.)

§ 22-5-16. Small business environmental compliance assistance program, compliance advisory panel.

The secretary of the department of commerce, labor, and environmental resources shall establish a small business stationary source technical and environmental compliance assistance program which meets the requirements of Title V of the Clean Air Act Amendments of 1990, 42 U.S.C. § 7661 et seq. A compliance advisory panel composed of seven members appointed as follows shall be created to periodically review the effectiveness and results of this assistance program:

(a) Two members who are not owners, nor representatives of owners, of small business stationary sources, selected by the governor to represent the general public;

(b) One member selected by the speaker of the House of Delegates who is an owner or who represents owners of small business stationary sources;

(c) One member selected by the minority leader of the House of Delegates who is an owner or who represents owners of small business stationary sources;

(d) One member selected by the president of the Senate who is an owner or who represents owners of small business stationary sources;

(e) One member selected by the minority leader of the Senate who is an owner or who represents owners of small business stationary sources; and

(f) One member selected by the director to represent the director. (1994, c. 61.)

ARTICLE 6.

OFFICE OF OIL AND GAS; OIL AND GAS WELLS; ADMINISTRATION; ENFORCEMENT.

Sec.

Editor's notes. — Acts 1994, c. 61 amended and reenacted this article, substituting present §§ 22-6-1 to 22-6-41 for former §§ 22-6-1 to 22-6-4, 22-6-4a, 22-6-4b, 22-6-4c and 22-6-5 to 22-6-7 (enacted by Acts 1985, c. 77 and amended by Acts 1986, c. 107; and 1988, c. 87), concerning the board of coal mine health and safety. The new provisions are sufficiently different from former §§ 22-6-1 to 22-6-7 that a detailed explanation of the changes and the retention of historical citations from the former laws were impracticable.

areas in making this inventory. The director shall investigate and study the problems of agriculture, industry, conservation, health, water pollution, domestic and commercial uses and allied matters as they relate to the water resources of the state, and shall make and formulate comprehensive plans and recommendations for the further development, improvement, protection, preservation, regulation and use of such water resources, giving proper consideration to the hydrologic cycle in which water moves. The director shall provide to the Legislature a biennial report on the quality of the state's waters, including an evaluation of the information which has been obtained in accordance with the requirements of this section and shall include in this report the plans and recommendations which have been formulated pursuant to the requirements of this section. Where possible the timing and content of this report shall be structured so that it may also be used to fulfill any federal program reporting requirements. The report shall include reasons for such plans and recommendations, as well as any changes in the law which are deemed desirable to effectuate such plans and recommendations. Such report shall be made available to the public at a reasonable price to be determined by the director.

The director may request, and, upon request, is entitled to receive from any agency of the state or any political subdivision thereof, or from any other person who engages in a commercial use or controls any of the water resources of the state, such necessary information and data as will assist in obtaining a complete picture of the water resources of the state and the existing control and commercial use thereof. The director shall reimburse such agencies, political subdivisions and other persons for any expenses, which would not otherwise have been incurred, in making such information and data available. (1994, c. 61.)

ARTICLE 12.

GROUNDWATER PROTECTION ACT.

Sec.

Editor's notes. — Acts 1994, c. 61 amended and reenacted this article, substituting present §§ 22-12-1 to 22-12-14 for former §§ 22-12-1 and 22-12-2 (enacted by Acts 1985, c. 77), concerning emergency medical personnel. The new provisions are sufficiently different from former §§ 22-12-1 and 22-12-2 that a detailed explanation of the changes and the retention of historical citations from the former laws were impracticable.

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§ 22-12-1. Short title.

This article may be known and cited as the "Groundwater Protection Act." (1994, c. 61.)

§ 22-12-2. Legislative findings, public policy and purposes.

(a) The Legislature finds that:

(1) West Virginia has relatively pure groundwater resources which are abundant and readily available;

(2) Over fifty percent of West Virginia's overall population, and over ninety percent of the state's rural population, depend on groundwater for drinking water;

(3) A rural lifestyle has created a quality of life in many parts of West Virginia which is highly valued. Maintaining this lifestyle depends upon protecting groundwater to avoid increased expenses associated with providing treated drinking water supplies to rural households;

(4) West Virginia's groundwater resources are geologically complex, with the nature and vulnerability of groundwater aquifers and recharge areas not fully known;

(5) Contamination of groundwater is generally much more difficult and expensive to clean up than is the case with surface water;

(6) Groundwaters and surface waters can be highly interconnected. The quality of any given groundwater can have a significant impact on the quality of groundwaters and surface waters to which it is hydrologically connected;

(7) A diverse array of human activities can adversely impact groundwater, making it necessary to develop regulatory programs that utilize a variety of approaches;

(8) Various agencies of state government currently exercise regulatory control over activities which may impact on groundwater. Coordination and streamlining of the regulatory activities of these agencies is necessary to assure that the state's groundwater is maintained and protected through an appropriate groundwater protection program;

(9) Disruption of existing state regulatory programs should be avoided to the maximum extent practical;

(10) The maintenance and protection of the state's groundwater resources can be achieved consistent with the maintenance and expansion of employment opportunities, agriculture, and industrial development; and

(11) A state groundwater management program will provide economic benefits to citizens of West Virginia now and in

(b) Therefore, the Legislature establishes that it is the public policy of the state of West Virginia to maintain and protect the state's groundwater so as to support the present and future beneficial uses and further to maintain and protect groundwater at existing quality where the existing quality is better than that required to maintain and protect the present and future beneficial uses. Such existing quality shall be maintained and protected unless it is established that (1) the measures necessary to preserve existing quality are not technically feasible or economically practical and (2) a change in groundwater quality is justified based upon economic or societal objectives. Such a change shall maintain and protect groundwater quality so as to support the present and future beneficial uses of such groundwater.

(c) The purposes of this article are to:

(1) Maintain and protect the state's groundwater resources consistent with this article to protect the present and future beneficial uses of the groundwater;

(2) Provide for the establishment of a state groundwater management program which will:

(i) Define the roles of agencies of the state and political subdivisions with respect to the maintenance and protection of groundwater, and designate a lead agency for groundwater management;

(ii) Designate a state agency responsible for establishment of groundwater quality standards;

(iii) Provide for the establishment of standards of purity and quality for all groundwater;

(iv) Provide for the establishment of groundwater protection programs consistent with this article;

(v) Establish groundwater protection and groundwater remediation funds;

(vi) Provide for the mapping and analysis of the state's groundwater resources and coordination of the agencies involved; and

(vii) Provide for public education on groundwater resources and methods for preventing contamination;

(3) Provide such enforcement and compliance mechanisms as will assure the implementation of the state's groundwater management program; and

(4) Assure that actions taken to implement this article are consistent with the policies set forth in section two [§ 22-11-2], article eleven of this chapter. (1994, c. 61.)

§ 22-12-3. Definitions.

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

(a) "Agency action" means the issuance, renewal or denial of any permit, license or other required agency approval, or any terms or conditions thereof, or any order or other directive issued by the division of environmental protection, bureau of public health, department of agriculture or any other agency of the state or a political subdivision to the extent that such action relates directly to the implementation, administration or enforcement of this

(b) "Beneficial uses" means those uses which are protective of human health and welfare and the environment. Pollution of groundwater is not considered a beneficial use.

(c) "Board" means the state water resources environmental quality board.

(d) "Constituent" means any chemical or biological substance found in groundwater due to either natural or man-made conditions.

(e) "Director" means the director of the division of environmental protection or such other person to whom the director has delegated authority or duties pursuant to section six or eight [§ 22-1-6 or § 22-1-8], article one of this chapter.

(f) "Groundwater" means the water occurring in the zone of saturation beneath the seasonal high water table, or any perched water zones.

(g) "Groundwater certification" means an assurance issued by the director of the division of environmental protection that a permit or other approval issued by a state, county or local government body regarding an activity that affects or is reasonably anticipated to affect groundwater complies with all requirements of this chapter, the legislative rules promulgated pursuant to this chapter in accordance with chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code and any other requirements of state law, rules or agreements regarding groundwater.

(h) "Person" means any industrial user, public or private corporation, institution, association, firm or company organized or existing under the laws of this or any other state or country; state of West Virginia; governmental agency, including federal facilities; political subdivision; county commission; municipal corporation; industry; sanitary district; public service 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 legal entity whatever.

(i) "Pollution" means the man-made or man-induced alteration of the chemical, physical, biological or radiological integrity of the groundwater.

(j) "Preventative action limit" means a numerical value expressing the concentration of a substance in groundwater that, if exceeded, causes action to be taken to assure that standards of purity and quality of groundwater are not violated.

(k) "Water" means any and all water on or beneath the surface of the ground, whether percolating, standing, diffused or flowing, wholly or partially within this state, or bordering this state and within its jurisdiction, and includes without limiting the generality of the foregoing, natural or artificial lakes, rivers, streams, creeks, branches, brooks, ponds (except farm ponds, industrial settling basins and ponds and water treatment facilities), impounding reservoirs, springs, wells, watercourses and wetlands. (1994, c. 61.)

§ 22-12-4. Authority of environmental quality board to promulgate standards of purity and quality.

(a) The environmental quality board has the sole and exclusive authority

shall promulgate such standards following a public hearing within one year from the effective date of this article, by legislative rules in accordance with the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code.

(b) Such standards shall establish the maximum contaminant levels permitted for groundwater, but in no event shall such standards allow contaminant levels in groundwater to exceed the maximum contaminant levels adopted by the United States Environmental Protection Agency pursuant to the federal Safe Drinking Water Act. The board may set standards more restrictive than the maximum contaminant levels where it finds that such standards are necessary to protect drinking water use where scientifically supportable evidence reflects factors unique to West Virginia or some area thereof, or to protect other beneficial uses of the groundwater. For contaminants not regulated by the federal Safe Drinking Water Act, standards for such contaminants shall be established by the board to be no less stringent than may be reasonable and prudent to protect drinking water or any other beneficial use. Where the concentration of a certain constituent exceeds such standards due to natural conditions, the natural concentration is the standard for that constituent. Where the concentration of a certain constituent exceeds such standard due to human-induced contamination, no further contamination by that constituent is allowed, and every reasonable effort shall be made to identify, remove or mitigate the source of such contamination, and to strive where practical to reduce the level of contamination over time to support drinking water use.

(c) The standards of purity and quality for groundwater promulgated by the board shall recognize the degree to which groundwater is hydrologically connected with surface water and other groundwater and such standards shall provide protection for such surface water and other groundwater.

(d) In the promulgation of such standards the board shall consult with the division of environmental protection, department of agriculture and the bureau of public health, as appropriate.

(e) Any groundwater standard of the board that is in effect on the effective date of this article shall remain in effect until modified by the board. Notwithstanding any other provisions of this code to the contrary, the authority of the board to adopt standards of purity and quality for groundwater granted by the provisions of this article is exclusive, and to the extent that any other provisions of this code grant such authority to any person, body, agency or entity other than the board, those other provisions are void. (1994, c. 61.)

Editor's notes. — Subsections (a) and (e) contain references to "the effective date of this article." Acts 1994, c. 61, which amended and reenacted this article, passed March 12, 1994 and became effective ninety days from passage.

The federal Safe Drinking Water Act is principally compiled in Titles 21 and 42 U.S.C.

§ 22-12-5. Authority of other agencies; applicability.

(a) Notwithstanding any other provision of this code to the contrary, no agency of state government or any political subdivision may [illegible] any

facility or activities for the purpose of maintaining and protecting the groundwater except as expressly authorized pursuant to this article.

(b) To the extent that such agencies have the authority pursuant to any provision of this code, other than this article, to regulate facilities or activities, the division of environmental protection, the department of agriculture, the bureau of public health, and such agencies of the state or any political subdivision as may be specifically designated by the director with the concurrence of such designated agencies or political subdivisions, as appropriate, are hereby authorized to be groundwater regulatory agencies for purposes of regulating such facilities or activities to satisfy the requirements of this article. In addition, the department of agriculture is hereby authorized to be the groundwater regulatory agency for purposes of regulating the use or application of pesticides and fertilizers. Where the authority to regulate facilities or activities which may adversely impact groundwater is not otherwise assigned to the division of environmental protection, the department of agriculture, the bureau of public health or such other specifically designated agency pursuant to any other provision of this code, the division of environmental protection is hereby authorized to be the groundwater regulatory agency with respect to such unassigned facilities or activities. The division of environmental protection shall cooperate with the department of agriculture and the bureau of public health, as appropriate, in the regulation of such unassigned facilities or activities.

(c) Within one year of the effective date of this article, the department of agriculture, bureau of public health and division of environmental protection shall promulgate in accordance with the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code such legislative rules as may be necessary to implement the authority granted them by this article.

(d) Groundwater regulatory agencies shall develop groundwater protection practices to prevent groundwater contamination from facilities and activities within their respective jurisdictions consistent with this article. Such practices shall include, but not be limited to, criteria related to facility design, operational management, closure, remediation and monitoring. Such agencies shall issue such rules, permits, policies, directives or any other appropriate regulatory devices, as necessary, to implement the requirements of this article.

(e) Groundwater regulatory agencies shall take such action as may be necessary to assure that facilities or activities within their respective jurisdictions maintain and protect groundwater at existing quality, where the existing quality is better than that required to maintain and protect the standards of purity and quality promulgated by the board to support the present and future beneficial uses of the state's groundwater.

(f) Where a person establishes to the director that (1) the measures necessary to preserve existing quality are not technically feasible or economically practical and (2) a change in groundwater quality is justified based upon economic or societal objectives, the director may allow for a deviation from such existing quality. Upon the director's finding of (1) and (2) above, the director may grant or deny such a deviation for a specific site, activity or

substantially similar and exist in a defined geographic area. The director's reasons for granting or denying such a deviation shall be set forth in writing and the director has the exclusive authority to determine the terms and conditions of such a deviation. To insure that groundwater standards promulgated by the board are not violated and that the present and future beneficial uses of groundwater are maintained and protected, the director shall evaluate the cumulative impacts of all facilities and activities on the groundwater resources in question prior to any granting of such deviation from existing quality. The director shall consult with the department of agriculture and the bureau of public health as appropriate in the implementation of this subsection. The director shall, upon a written request for such information, provide notice of any deviations from existing quality granted pursuant to this subsection.

(g) Should the approval required in subsection (f) of this section be granted allowing for a deviation from existing quality, the groundwater regulatory agencies shall take such alternative action as may be necessary to assure that facilities and activities within their respective jurisdictions maintain and protect the standards of purity and quality promulgated by the board to support the present and future beneficial uses for that groundwater. In maintaining and protecting such standards of the board, such agencies shall establish preventative action limits which, once reached, shall require action to control a source of contamination to assure that such standards are not violated. The director shall provide guidelines to the groundwater regulatory agencies with respect to the establishment of such preventative action limits.

(h) Subsections (e), (f) and (g) of this section do not apply to coal extraction and earth disturbing activities directly involved in coal extraction that are subject to either or both article three or eleven [§ 22-3-1 et seq. or § 22-11-1 et seq.] of this chapter. Such activities are subject to all other provisions of this article.

(i) This article is not applicable to groundwater within areas of geologic formations which are site specific to:

(1) The production or storage zones of crude oil or natural gas and which are utilized for the exploration, development or production of crude oil or natural gas permitted pursuant to articles six, seven, eight, nine or ten [§ 22-6-1 et seq., § 22-7-1 et seq., § 22-8-1 et seq., § 22-9-1 et seq. or § 22-10-1 et seq.] of this chapter; and

(2) The injection zones of Class II or III wells permitted pursuant to the statutes and rules governing the underground injection control program.

All groundwater outside such areas remain subject to the provisions of this article. Groundwater regulatory agencies have the right to require the submission of data with respect to the nature of the activities subject to this subsection.

(j) Those agencies regulating the activities specified in subsections (h) and (i), of this section retain their groundwater regulatory authority as provided for in the relevant statutes and rules governing such activities, other than this article.

(k) The director has authority to modify the requirements of subsection (g) of this section with respect to noncoal mining activities subject to article four

[§ 22-4-1 et seq.] of this chapter. Such modification shall assure protection of human health and the environment. Those agencies regulating such noncoal mining activities shall retain their groundwater regulatory authority as provided for in the relevant statutes and rules governing such activities other than this article.

(*l*) If the director proposes a need for a variance for classes of activities which by their nature cannot be conducted in compliance with the requirements of subsection (g) of this section, then the director shall promulgate legislative rules in accordance with chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code, following public hearing on the record. The rules so promulgated shall set forth the director's findings to substantiate such need and the criteria by which such variances shall be granted or denied. Should any person petition or request the director to undertake such a determination, that person will give contemporaneous notice of such petition or request by Class I advertisement in a newspaper of general circulation in the area to be affected by the request.

(m) All rules, permits, policies, directives and orders of the department of agriculture, the bureau of public health and division of environmental protection, in effect on the effective date of this article and which are consistent with this article shall remain in full force and effect as if they were issued pursuant to this article unless and until modified pursuant to this article. (1994, c. 61.)

Editor's notes. — Subsection (c) contains a reference to "the effective date of this article." Acts 1994, c. 61, which amended and reenacted this section, passed March 12, 1994 and became effective ninety days from passage.

§ 22-12-6. Lead agency designation; additional powers and duties.

(a) The division of environmental protection is hereby designated to be the lead agency for groundwater and is authorized and shall perform the following additional powers and duties:

(1) To maintain the state groundwater management strategy;

(2) To develop, as soon as practical, a central groundwater data management system for the purpose of providing information needed to manage the state's groundwater program;

(3) To provide a biennial report to the Legislature on the status of the state's groundwater and groundwater management program, including detailed reports from each groundwater regulatory agency;

(4) To coordinate with other agencies to develop a uniform groundwater program;

(5) To perform any and all acts necessary to obtain the benefits to the state of a federal program related to groundwater;

(6) To receive grants, gifts or contributions for purposes of implementing this [illegible] from federal agencies, state agencies or any other persons interested in the management of groundwater resources; and

(7) To promulgate legislative rules implementing this subsection in accordance with the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code, including rules relating to monitoring and analysis of groundwater.

(b) The division of environmental protection, bureau of public health, and department of agriculture shall participate in the data management system developed by the division of environmental protection pursuant to subsection (a) of this section and shall provide the director with such information as the director shall reasonably request in support of his or her promulgation of rules pursuant to this article.

(c) The division of environmental protection, bureau of public health, and department of agriculture are hereby authorized:

(1) To engage the voluntary cooperation of all persons in the maintenance and protection of groundwater, and to advise, consult and cooperate with all persons, all agencies of this state, universities and colleges, the federal government or other states, and with interstate agencies in the furtherance of the purposes of this article, and to this end and for the purposes of studies, scientific or other investigations, research, experiments and demonstrations pertaining thereto, receive and spend funds as appropriated by the Legislature, and from such agencies and other officers and persons on behalf of the state;

(2) To encourage the formulation and execution of plans to maintain and protect groundwater by cooperative groups or associations of municipal corporations, industries, industrial users and other users of groundwaters of the state, who, jointly or severally, are or may be impacting on the maintenance and protection of groundwater;

(3) To encourage, participate in, or conduct or cause to be conducted studies, scientific or other investigations, research, experiments and demonstrations relating to the maintenance and protection of groundwater, and to collect data with respect thereto, all as may be deemed advisable and necessary to carry out the purposes of this article, and to make reports and recommendations with respect thereto;

(4) To conduct groundwater sampling, data collection, analyses and evaluation with sufficient frequency so as to ascertain the characteristics and quality of groundwater, and the sufficiency of the groundwater protection programs established pursuant to this article;

(5) To develop a public education and promotion program to aid and assist in publicizing the need of and securing support for the maintenance and protection of groundwater. (1994, c. 61.)

§ 22-12-7. Groundwater coordinating committee; creation.

(a) The state groundwater coordinating committee is continued. It consists of the commissioner of the bureau of public health, the commissioner of agriculture, the chair of the environmental quality board, the chief of the office of water resources of the division of environmental protection and the director

(b) The groundwater coordinating committee shall consult, review and make recommendations on the implementation of this article by each of the groundwater regulatory agencies. Such committee shall require the periodic submittal to it of the groundwater protection programs of each groundwater regulatory agency including all rules, permits, policies, directives and any other regulatory devices employed to implement this article.

(c) Upon a review of such programs, the groundwater coordinating committee shall recommend to the director approval of such programs, in whole or in part, and identify in writing any aspect of such programs that are not sufficient to satisfy the requirements of this article and specify a reasonable time period for correcting those portions of the program that are found not to be sufficient.

(d) The director may accept the recommendation of the committee, in whole or in part, and identify in writing any additional aspects of such programs that are not sufficient to satisfy the requirements of this article and specify a time period for correcting those portions of the program that are found not to be sufficient.

(e) In the biennial report to the Legislature required by this article, the director shall identify all portions of groundwater protection programs which have been determined not to be sufficient to satisfy the requirements of this article and which have not been adequately addressed within the time period specified by the director.

(f) No agency shall modify any aspect of its groundwater protection program as approved by the director without the prior written approval of the director of such modification. This requirement does not relieve such agency of any other requirements of law that may be applicable to such a modification.

(g) The groundwater coordinating committee is authorized and empowered to promulgate such legislative rules as may be necessary to implement this section in accordance with the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code. (1994, c. 61.)

§ 22-12-8. Groundwater certification.

(a) To ensure a comprehensive, consistent and unfragmented approach to the management and protection of groundwater, including evaluation of the cumulative effects of all activities that have the potential to impact on groundwater, the director shall oversee and coordinate the implementation of this article by each of the groundwater regulatory agencies through a groundwater certification program as hereby established.

(b) Every state, county or local government body which reviews or issues permits, licenses, registrations, certificates of other forms of approval, or renewal thereof, for activities or practices which may affect groundwater quality shall first submit to the director for review and approval an application for certification. Such application shall include a copy of the approval proposed by such body, including any terms and conditions which have been imposed by it. Upon receipt of this application, the director shall act within thirty days to [illegible] whether to waive or exercise his or her certification powers. If no [illegible] period

groundwater certification is approved. If the director decides to exercise his or her certification powers, he or she may utilize additional time, not to exceed an additional sixty days, to further review the materials submitted or to conduct such investigations as he or she deems necessary.

(c) The director may waive, grant, grant with conditions, or deny groundwater certification. Groundwater certification, and all conditions required under such certification, shall become a condition on any permit, approval or renewal thereof, issued by any state, county or local government body. Where appropriate, the director may provide general groundwater certification for or may waive certification for classes or categories of activities or approvals. (1994, c. 61.)

§ 22-12-9. Groundwater protection fees authorized; director to promulgate rules; dedication of fee proceeds; groundwater protection fund established; groundwater remediation fund established.

(a) The director of the division of environmental protection shall promulgate legislative rules in accordance with the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code establishing a schedule of groundwater protection fees applicable to persons who own or operate facilities or conduct activities subject to the provisions of this article. The schedule of fees shall be calculated by the director to recover the reasonable and necessary costs of implementing the provisions of this article as it relates to a particular facility or activity. In addition, the fee may include an appropriate assessment of other program costs not otherwise attributable to any particular facility or activity. Such fees in the aggregate shall not exceed one million dollars per year and shall be deposited into the groundwater protection fund established pursuant to this article: Provided, That any unexpended balance in the groundwater protection fund at the end of each fiscal year may, by an act of the Legislature, be transferred to the groundwater remediation fund created by this article: Provided, however, That if no action is taken to transfer the unexpended balance to the remediation fund, such moneys shall not be transferred to the general revenue fund, but shall remain in the groundwater protection fund. Such fees imposed by this section are in addition to all other fees and taxes levied by law. The director shall require such fees to be paid at the time of certification pursuant to section eight [§ 22-12-8] of this article, or at such more frequent time as the director may deem to be appropriate. The director may withhold certification pursuant to section eight of this article where such fees have not been timely paid.

(b) The director of the division of environmental protection shall also promulgate legislative rules in accordance with the provisions of chapter twenty-nine-a of this code establishing a schedule of groundwater remediation fees which in the aggregate shall not exceed two hundred fifty thousand dollars. Such groundwater remediation fees shall be assessed over a time period not to exceed two years from effective date of such rules and shall be

deposited into the groundwater remediation fund established pursuant to this article. Such fees shall be assessed against persons who own or operate facilities or conduct activities subject to the provisions of this article in proportion to the groundwater protection fees assessed pursuant to subsection (a) of this section for the year in which such groundwater remediation fees, or any portion thereof, are assessed.

(c) The following two special revenue accounts are continued in the state treasury:

(1) The "Groundwater Protection Fund", the moneys of which shall be expended by the director in the administration, certification, enforcement, inspection, monitoring, planning, research and other activities of the environmental quality board, division of environmental protection, bureau of public health and department of agriculture in accordance with legislative rules promulgated pursuant to the provisions of chapter twenty-nine-a of this code. The moneys, including the interest thereon, in said fund shall be kept and maintained by the director and expended without appropriation by the Legislature for the purpose of implementing the provisions of this article. The director may withhold the payment of any such moneys to any agency whose groundwater protection program has been determined by the director, in consultation with the groundwater coordinating committee, not to be sufficient to satisfy the requirements of this article and where such agency has failed to adequately address such determination within the time period specified by the director. At the end of each fiscal year, any unexpended balance of said fund may not be transferred to the general revenue fund, but shall remain in the groundwater protection fund.

(2) The "Groundwater Remediation Fund", the moneys of which, to the extent that moneys are available, shall be expended by the director for the purposes of investigation, clean-up and remedial action intended to identify, minimize or mitigate damage to the environment, natural resources, public and private water supplies, surface waters and groundwaters and the public health, safety and general welfare which may result from contamination of groundwater or the related environment. The director or other authorized agency officials are authorized to recover through civil action or cooperative agreements with responsible persons the full amount of any and all groundwater remediation fund moneys expended pursuant to this article. All moneys expended from such fund which are so recovered shall be deposited in such fund. The director may expend moneys from said fund and the interest thereon without necessity of appropriation by the Legislature. All civil penalties and assessments of civil administrative penalties collected pursuant to this article shall be deposited into the said fund. In addition, said fund may receive proceeds from any gifts, grants, contributions or other moneys accruing to the state which are specifically designated for inclusion in the fund. (1994, c. 61.)

§ 22-12-10. Civil and criminal penalties; civil administrative penalties; dedication of penalty proceeds; injunctive relief; enforcement orders; hearings.

(a) Any person who violates any provision of this article, or any permit or agency approval, rule or order issued to implement this article, is subject to civil penalties in accordance with the provisions of section twenty-two [§ 22-11-22], article eleven of this chapter: Provided, That such penalties are in lieu of civil penalties which may be imposed under other provisions of this code for the same violation.

(b) Any person who willfully or negligently violates any provision of this article, or any provision of a permit or agency approval, rule or order issued to implement this article, is subject to criminal penalties in accordance with the provisions of section twenty-four [§ 22-11-24], article eleven of this chapter: Provided, That such penalties are in lieu of other criminal penalties which may be imposed under other provisions of this code for the same violation.

(c) Any person who violates any provision of this article, or any permit or rule or order issued to implement this article, is subject to a civil administrative penalty to be levied by the director, the commissioner of agriculture or the commissioner of the bureau of public health, as appropriate, of not more than five thousand dollars for each day of such violation, not to exceed a maximum of twenty thousand dollars. In assessing any such penalty, any such official shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements as well as any other appropriate factors as may be established by such official by legislative rules promulgated pursuant to this article and the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code. No assessment may be levied pursuant to this subsection until after the alleged violator has been notified by such official by certified mail or personal service. The notice shall include a reference to the section of the statute, rule, order or statement of permit conditions that was allegedly violated, a concise statement of the facts alleged to constitute the violation, a statement of the amount of the administrative penalty to be imposed and a statement of the alleged violator's right to an informal hearing. The alleged violator shall have twenty calendar days from receipt of the notice within which to deliver to such official a written request for an informal hearing. If no hearing is requested, the notice becomes a final order after the expiration of the twenty-day period. If a hearing is requested, such official shall inform the alleged violator of the time and place of the hearing. Such official may appoint an assessment officer to conduct the informal hearing who shall make a written recommendation to such official concerning the assessment of a civil administrative penalty. Within thirty days following the informal hearing, such official shall issue and furnish to the violator a written decision, and the reasons therefor, concerning the assessment of a civ istrative penalty. Within thirty days after notification of such offic on, the alleged violator may request a formal hearing before the boar in accordance with the provisions of section eleven [§ 22-12-11] of this article [illegible]

istrative civil penalty assessed pursuant to this section is in lieu of any other civil penalty which may be assessed under any provision of this code for the same violation. No combination of assessments against any violator under this section may exceed twenty-five thousand dollars per day of each such violation. All administrative penalties shall be levied in accordance with legislative rules promulgated by such official in accordance with the provisions of chapter twenty-nine-a of this code.

(d) The net proceeds of all civil penalties collected pursuant to subsection (a) of this section and all assessments of any civil administrative penalties collected pursuant to subsection (c) of this section shall be deposited into the groundwater remediation fund established pursuant to this article.

(e) Any such official may seek an injunction, or may institute a civil action against any person in violation of any provision of this article or any permit, agency approval, rule or order issued to implement this article. In seeking an injunction, it is not necessary for such official to post bond nor to allege or prove at any point in the proceeding that irreparable damage will occur if the injunction is not issued or that the remedy at law is inadequate. An application for injunctive relief or a civil penalty action under this section may be filed and relief granted notwithstanding the fact that all administrative remedies provided for in this article have not been exhausted or invoked against the person or persons against whom such relief is sought.

(f) If any such official upon inspection, investigation or through other means observes, discovers or learns of a violation of the provisions of this article, or any permit, order or rules issued to implement the provisions of this article, he or she may issue an order stating with reasonable specificity the nature of the violation and requiring compliance immediately or within a specified time. An order under this section includes, but is not limited to, any or all of the following: Orders implementing this article which (1) suspend, revoke or modify permits; (2) require a person to take remedial action; or (3) are cease and desist orders.

(g) Any person issued a cease and desist order under subsection (f) of this section may file a notice of request for reconsideration with such official not more than seven days from the issuance of such order and shall have a hearing before such official to contest the terms and conditions of such order within ten days after filing such notice of a request for reconsideration. The filing of a notice of request for reconsideration does not stay or suspend the execution or enforcement of such cease and desist order. (1994, c. 61.)

§ 22-12-11. Appeal procedures.

Any person having an interest which is or may be adversely affected, or who is aggrieved by an order of the director or any public official authorized to take or implement an agency action, or by the issuance or denial of a permit issued to implement this article or by such permit's term or conditions, or by the failure or refusal to act within a reasonable time, may appeal to the environ- provided in article one [§ 22B-1-1 et seq.], chapter

§ 22-12-12. Rule-making petition.

Any person may petition the appropriate rule-making agency for rule making on an issue arising under this article. The appropriate rule-making agency, if it believes such issue to merit rule making, may initiate rule making in accordance with the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code. A decision by the appropriate rule-making agency not to pursue rule making must set forth in writing reasons for refusing to do so. Any person may petition an agency to issue a declaratory ruling pursuant to section one [§ 29A-4-1], article four, chapter twenty-nine-a of this code with respect to the applicability to any person, property or state of facts of any rules promulgated by that agency pursuant to this article. (1994, c. 61.)

§ 22-12-13. Existing rights and remedies preserved; effect of compliance.

(a) It is the purpose of this article to provide additional and cumulative remedies to address the quality of the groundwater of the state. This article does not alter the authority of any agency with respect to water other than groundwater. Except as expressly stated in this article, it is not the intention of the Legislature in enacting this article to repeal any other provision of this code.

(b) Nothing contained in this article abridges or alters rights of action or remedies now or hereafter existing, nor do any provisions in this article, or any act done by virtue of this article, estop the state, municipalities, public health officers or persons as riparian owners or otherwise, in the exercise of their rights to suppress nuisances or to abate any pollution now or hereafter existing, or to recover damages.

(c) Where a person is operating a source or conducting an activity in compliance with the terms and conditions of a permit, rule, order, directive or other authorization issued by a groundwater regulatory agency pursuant to this article, such person is not subject to criminal prosecution for pollution recognized and authorized by such permit, rule, order, directive or other authorization. (1994, c. 61.)

§ 22-12-14. Effective dates of provisions subject to federal approval.

To the extent that this article modifies any powers, duties, functions and responsibilities of any state agency that may require approval of one or more federal agencies or officials in order to avoid disruption of the federal-state relationship involved in the implementation of federal regulatory programs by the state, any such modifications become effective upon a proclamation by the governor stating either that final approval of such modifications has been given by the appropriate federal agency or official or that final approval of such modification is not necessary to avoid disruption of the federal-state relationship under which such regulatory programs are implemented. (1994, c. 61.)

§ 22-17-22. Underground storage tank insurance fund.

(a) The director may establish an underground storage tank insurance fund for the purpose of satisfying the financial responsibility requirements established pursuant to section ten [§ 22-17-10] of this article. In addition to the capitalization fee to be assessed against all owners or operators of underground storage tanks provided by subdivision (6), subsection (b), section six [§ 22-17-6(b)(6)] of this article, the director shall promulgate rules establishing an annual financial responsibility assessment to be assessed on and paid by owners or operators of underground storage tanks who are unable to obtain insurance or otherwise meet the financial responsibility requirements established pursuant to section ten of this article. Such assessments shall be paid into the state treasury into a special fund designated "the underground storage tank insurance fund".

(b) At the end of each fiscal year, any unexpended balance of such assessment shall not be transferred to the general revenue fund but shall remain in the underground storage tank insurance fund. (1994, c. 61.)

§ 22-17-23. Duplicative enforcement prohibited.

No enforcement proceeding brought pursuant to this article may be duplicated by an enforcement proceeding subsequently commenced under some other article of this code with respect to the same transaction or event unless such subsequent proceeding involves the violation of a permit or permitting requirement of such other article. (1994, c. 61.)

ARTICLE 18.

HAZARDOUS WASTE MANAGEMENT ACT.

Editor's notes. — The Hazardous Waste Management Act was formerly compiled in c. 20, art. 5E.

State or federal preemption. — Since both the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(f), and the West Virginia Hazardous Waste Management Act, former § 20-5E-18(d) and (h), see now § 22-18-19, have provisions preserving common law actions, including nuisance actions, an ordinance passed by a municipality declaring the permanent disposal of hazardous wastes as therein defined to be a public nuisance is not preempted by the federal or State acts. Sharon Steel Corp. v. City of Fairmont, 334 S.E.2d 616 (W. Va. 1985), appeal dismissed, 474 U.S. 1098, 106 S. Ct. 875, 88 L. Ed. 2d 912 (1986).

§ 22-18-1. Short title.

This article may be known and cited as the "Hazardous Waste Management Act." (1994, c. 61.)

§ 22-18-2. Declaration of policy.

(a) The Legislature finds that:

(1) Continuing technological progress and increases in the amount of manufacture and the abatement of air and water pollution have resulted in ever increasing quantities of hazardous wastes;

(2) The public health and safety and the environment are threatened where hazardous wastes are not managed in an environmentally sound manner;

(3) The knowledge and technology necessary for alleviating adverse health, environmental and aesthetic impacts resulting from current hazardous waste management and disposal practices are generally available;

(4) The manufacture, refinement, processing, treatment and use of coal, raw chemicals, ores, petroleum, gas and other natural and synthetic products are activities that make a significant contribution to the economy of this state; and

(5) The problem of managing hazardous wastes has become a matter of statewide concern.

(b) Therefore, it is hereby declared that the purposes of this article are:

(1) To protect the public health and safety and the environment from the effects of the improper, inadequate or unsound management of hazardous wastes;

(2) To establish a program of regulation over the storage, transportation, treatment and disposal of hazardous wastes;

(3) To assure the safe and adequate management of hazardous wastes within this state; and

(4) To assume regulatory primacy through Subtitle C of the Resource Conservation and Recovery Act. (1994, c. 61.)

Editor's notes. — The Resource Conservation and Recovery Act, referred to in (b)(4), is compiled in 42 U.S.C. § 6901 et seq.

W. Va. Law Review. — Flannery and Poland, "Hazardous Waste Management Act — Closing the Circle," 84 W. Va. L. Rev. 347 (1982).

§ 22-18-3. Definitions.

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

(1) "Director" means the director of the division of environmental protection or such other person to whom the director has delegated authority or duties pursuant to sections six or eight [§ 22-1-6 or § 22-1-8], article one of this chapter;

(2) "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any hazardous waste into or on any land or water so that such hazardous waste or any constituent thereof may enter the environment or be emitted into the air, or discharged into any waters, including groundwaters;

(3) "Division" means the division of environmental protection;

(4) "Generation" means the act or process of producing hazardous waste materials;

(5) "Hazardous and Solid Waste Amendments of 1984" means the federal Hazardous and Solid Waste Amendments of 1984 (P.L. 98-616) amending the Resource Conservation and Recovery Act;

(6) "Hazardous waste" means a waste or combination of wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics, may: (A) Cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed;

(7) "Hazardous waste fuel" means fuel produced from any hazardous waste identified or listed pursuant to subdivision (2), subsection (a), section six [§ 22-18-6(a)(2)] of this article, or produced from any hazardous waste identified or listed pursuant to section six [§ 22-18-6];

(8) "Hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery and disposal of hazardous wastes;

(9) "Land disposal" means any placement of hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave;

(10) "Manifest" means the form used for identifying the quantity, composition and the origin, routing and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment or storage;

(11) "Person" means any individual, trust, firm, joint stock company, public, private or government corporation, partnership, association, state or federal agency, the United States government, this state or any other state, municipality, county commission or any other political subdivision of a state or any interstate body;

(12) "Resource Conservation and Recovery Act" means the federal Resource [illegible] as amended;

(13) "Storage" means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste;

(14) "Subtitle C" means Subtitle C of the Resource Conservation and Recovery Act;

(15) "Treatment" means any method, technique or process, including neutralization, designed to change the physical, chemical or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable to recovery, amenable to storage or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous;

(16) "Waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining and agricultural operations and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the federal Water Pollution Control Act, as amended, or source, special nuclear or by-product material as defined by the federal Atomic Energy Act of 1954, as amended. (1994, c. 61.)

Editor's notes. — The federal Hazardous and Solid Waste Amendments of 1984, referred to in (5), are compiled in 42 U.S.C § 6901 et seq.

The Resource Conservation and Recovery Act, referred to in (14), is compiled in 42 U.S.C. § 6901 et seq.

The federal Water Pollution Control Act, referred to in (16), is compiled in 33 U.S.C. § 1151 et seq.

The federal Atomic Energy Act of 1954, referred to in (16), is compiled in 42 U.S.C. § 2011 et seq.

W. Va. Law Review. — Flannery and Poland, "Hazardous Waste Management Act — Closing the Circle," 84 W. Va. L. Rev. 347 (1982).

§ 22-18-4. Designation of division of environmental protection as the state hazardous waste management lead agency.

The division of environmental protection is hereby designated as the hazardous waste management lead agency for this state for purposes of Subtitle C of the Resource Conservation and Recovery Act, and is hereby authorized to take all action necessary or appropriate to secure to this state the benefits of said legislation. In carrying out the purposes of this article, the director is hereby authorized to cooperate with the federal environmental protection agency and other agencies of the federal government, this state and other states and other interested persons in all matters relating to hazardous waste management. (1994, c. 61.)

Editor's notes. — The Resource Conservation and Recovery Act, referred to above, is compiled in 42 U.S.C. § 6901 et seq.

§ 22-18-5. Powers and duties of director; integration with other acts; establishment of study of hazardous waste management.

(a) In addition to all other powers and duties prescribed in this article or otherwise by law, and unless otherwise specifically set forth in this article, the director shall perform any and all acts necessary to carry out the purposes and requirements of Subtitle C of the Resource Conservation and Recovery Act.

(b) The director shall integrate all provisions of this article for purposes of administration and enforcement and shall avoid duplication to the maximum extent practicable, with the appropriate provisions of: The public health laws in chapter sixteen [§ 16-1-1 et seq.] of this code; article sixteen-a [§ 19-16A-1 et seq.], chapter nineteen of this code; this chapter; and chapters twenty-two-b and twenty-two-c [§ 22B-1-1 et seq. and § 22C-1-1 et seq.] of this code.

(c) The director may enter into any agreements, including reimbursement for services rendered, contracts or cooperative arrangements, under such terms and conditions as he or she deems appropriate, with other state agencies, educational institutions or other organizations and individuals as necessary to implement the provisions of this article.

(d) The director shall cooperate with and may receive and expend money from the federal government and other sources.

(e) The director shall (1) encourage, participate in and conduct an ongoing investigation and analysis of methods, incentives, technologies of source reduction, reuse, recycling or recovery of potentially hazardous waste and a strategy for encouraging the utilization or reduction of hazardous waste, and (2) investigate the feasibility of operating an information clearinghouse for hazardous wastes.

(f) The director shall provide for the continuing education and training of appropriate division personnel in matters of hazardous waste management. (1994, c. 61.)

Editor's notes. — The Resource Conservation and Recovery Act, referred to in (a), is compiled in 42 U.S.C. § 6901 et seq.

The Oil and Gas Laws, formerly codified in c. 22, art. 4, are now codified in c. 22, art. 6 and 7.

§ 22-18-6. Promulgation of rules by director.

(a) The director has overall responsibility for the promulgation of rules under this article. The director shall promulgate the following rules, in consultation with the department of health and human resources, the office of emergency services, the public service commission, the state fire marshal, the department of public safety, the division of highways, the department of agriculture, and the environmental quality board. In promulgating and revising such rules, the director shall comply with the provisions of chapter twenty-nine [§ 29A-1-1 et seq.] of this code, shall avoid duplication to the maximum extent practicable with the appropriate provisions of the acts and laws set out in subsection (b), section five [§ 22-18-5(b)] of this article and shall

effect than the rules and regulations promulgated by the federal environmental protection agency pursuant to the Resource Conservation and Recovery Act:

(1) Rules establishing a plan for the safe and effective management of hazardous wastes within the state;

(2) Rules establishing criteria for identifying the characteristics of hazardous waste, identifying the characteristics of hazardous waste and listing particular hazardous wastes which are subject to the provisions of this article: Provided, That:

(A) Each waste listed below shall, except as provided in paragraph (B) of this subdivision, be subject only to regulation under other applicable provisions of federal or state law in lieu of this article until proclamation by the governor finding that at least six months have elapsed since the date of submission of the applicable study required to be conducted under Section 8002 of the federal Solid Waste Disposal Act, as amended, and that regulations have been promulgated with respect to such wastes in accordance with Section 3001 (b) (3) (C) of the Resource Conservation and Recovery Act, and finding in the case of the wastes identified in subparagraph (iv) of this paragraph that the regulation of such wastes has been authorized by an act of Congress in accordance with Section 3001 (b) (2) of the Resource Conservation and Recovery Act:

(i) Fly ash waste, bottom ash waste, slag waste and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels;

(ii) Solid waste from the extraction, beneficiation and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore;

(iii) Cement kiln dust waste; and

(iv) Drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil or natural gas or geothermal energy.

(B) Owners and operators of disposal sites for wastes listed in paragraph (A) of this subdivision may be required by the director through rule prescribed under authority of this section:

(i) As to disposal sites for such wastes which are to be closed, to identify the locations of such sites through surveying, platting or other measures, together with recordation of such information on the public record, to assure that the locations where such wastes are disposed of are known and can be located in the future; and

(ii) To provide chemical and physical analysis and composition of such wastes, based on available information, to be placed on the public record;

(3) Rules establishing such standards applicable to generators of hazardous waste identified or listed under this article as may be necessary to protect public health and safety and the environment, which standards shall establish requirements respecting: (A) Record-keeping practices that accurately identify the quantities of such hazardous waste generated, the constituents thereof which are significant in quantity or in potential harm to public health or the environment and the disposition of such wastes; (B) labeling for any containers used for the storage, transport or disposal of such hazardous waste

such as will identify accurately such waste; (C) use of appropriate containers for such hazardous waste; (D) furnishing of information on the general chemical composition of such hazardous wastes to persons transporting, treating, storing or disposing of such wastes; (E) use of a manifest system and any other reasonable means necessary to assure that all such hazardous waste generated is designated for treatment, storage or disposal in, and arrives at treatment, storage or disposal facilities (other than facilities on the premises where the waste is generated) with respect to which permits have been issued which are required: (i) By this article or any rule required by this article to be promulgated; (ii) by Subtitle C of the Resource Conservation and Recovery Act; (iii) by the laws of any other state which has an authorized hazardous waste program pursuant to Section 3006 of the Resource Conservation and Recovery Act; or (iv) by Title I of the federal Marine Protection, Research and Sanctuaries Act; and (F) the submission of reports to the director at such times as the director deems necessary setting out the quantities of hazardous wastes identified or listed under this article that the generator has generated during a particular time period, and the disposition of all such hazardous waste;

(4) Rules establishing such performance standards applicable to owners and operators of facilities for the treatment, storage or disposal of hazardous waste identified or listed under this article as may be necessary to protect public health and safety and the environment, which standards shall, where appropriate, distinguish in such standards between requirements appropriate for new facilities and for facilities in existence on the date of promulgation of such rules and shall include, but need not be limited to, requirements respecting: (A) Maintaining records of all hazardous wastes identified or listed under this article which are treated, stored or disposed of, as the case may be, and the manner in which such wastes were treated, stored or disposed of; (B) satisfactory reporting, monitoring and inspection and compliance with the manifest system referred to in subdivision (3) of subsection (a) of this section; (C) treatment, storage or disposal of all such waste received by the facility pursuant to such operating methods, techniques and practices as may be satisfactory to the director; (D) the location, design and construction of such hazardous waste treatment, disposal or storage facilities; (E) contingency plans for effective action to minimize unanticipated damage from any treatment, storage or disposal of any such hazardous waste; (F) the maintenance of operation of such facilities and requiring such additional qualifications as to ownership, continuity of operation, training for personnel and financial responsibility as may be necessary or desirable; however, no private entity may be precluded by reason of criteria established under this subsection from the ownership or operation of facilities providing hazardous waste treatment, storage or disposal services where such entity can provide assurances of financial responsibility and continuity of operation consistent with the degree and duration of risks associated with the treatment, storage or disposal of specified hazardous waste; and (G) compliance with the requirements of section eight of this article respecting permits for treatment, storage or

(5) Rules specifying the terms and conditions under which the director shall issue, modify, suspend, revoke or deny such permits as may be required by this article;

(6) Rules for the establishment and maintenance of records; the making of reports; the taking of samples and the performing of tests and analyses; the installing, calibrating, operating and maintaining of monitoring equipment or methods; and the providing of any other information as may be necessary to achieve the purposes of this article;

(7) Rules establishing standards and procedures for the certification of personnel at hazardous waste treatment, storage or disposal facilities or sites;

(8) Rules for public participation in the implementation of this article;

(9) Rules establishing procedures and requirements for the use of a manifest during the transport of hazardous wastes;

(10) Rules establishing procedures and requirements for the submission and approval of a plan, applicable to owners or operators of hazardous waste storage, treatment and disposal facilities, as necessary or desirable for closure of the facility, post-closure monitoring and maintenance, sudden and accidental occurrences and nonsudden and accidental occurrences;

(11) Rules establishing a schedule of fees to recover the costs of processing permit applications and permit renewals;

(12) Rules, including exemptions and variances, as appropriate: (A) Establishing standards and prohibitions relating to the management of hazardous waste by land disposal methods; (B) establishing standards and prohibitions relating to the land disposal of liquid hazardous wastes or free liquids contained in hazardous wastes and any other liquids which are not hazardous wastes; (C) establishing standards applicable to producers, distributors or marketers of hazardous waste fuels; and (D) as are otherwise necessary to allow the state to assume primacy for the administration of the federal hazardous waste management program under the Resource Conservation and Recovery Act and in particular, the Hazardous and Solid Waste Amendments of 1984: Provided, That such rules authorized by this subdivision shall be consistent with but no more expansive in coverage nor more stringent in effect than rules and regulations promulgated by the federal environmental protection agency under Subtitle C;

(13) Rules: (A) Establishing air pollution performance standards and permit requirements and procedures as may be necessary to comply with the requirements of this article and in accordance with the provisions of article five [§ 22-5-1 et seq.] of this chapter. Such permits shall be in addition to those permits required by section eight [§ 22-18-8] of this article;

(B) For the monitoring and control of air emissions at hazardous waste treatment storage and disposal facilities, including, but not limited to, open tanks, surface impoundments and landfills, as may be necessary to protect human health and the environment; and

(C) Establishing standards applicable to the owners and operators of facilities which burn, for purposes of energy recovery, any fuel produced from any hazardous waste identified or listed pursuant to subdivision (2), subsec-

identified or listed pursuant to subdivision (2), subsection (a) of this section and any other material, as may be necessary to protect human health and the environment: Provided, That such legislative rules shall be consistent with Subtitle C.

Any person aggrieved or adversely affected by an order of the director made and entered to implement or enforce the rules required by this subdivision or by the failure or refusal of said director to act within a reasonable time on an application for a permit or by the issuance or denial of or by the terms and conditions of a permit granted under the provisions of the rules required by this subdivision, may appeal to the air quality board in accordance with the procedure set forth in article one [§ 22B-1-1 et seq.], chapter twenty-two-b of this code, and orders made and entered by said board are subject to judicial review in accordance with the procedures set forth in article one, chapter twenty-two-b of this code, except that as to cases involving an order granting or denying an application for a permit, revoking or suspending a permit or approving or modifying the terms and conditions of a permit or the failure to act within a reasonable time on an application for a permit, the petition for judicial review shall be filed in the circuit court of Kanawha County.

(14) Rules developing performance standards and other requirements under this section as may be necessary to protect public health and the environment from any hazard associated with the management of used oil and recycled oil. The director shall ensure that such rules do not discourage the recovery or recycling of used oil. For these purposes, "used oil" shall mean any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities.

(15) Such other rules as are necessary to effectuate the purposes of this article.

(b) The rules required by this article to be promulgated shall be reviewed and, where necessary, revised not less frequently than every three years. Additionally, the rules required to be promulgated by this article shall be revised, as necessary, within two years of the effective date of any amendment of the Resource Conservation and Recovery Act and within six months of the effective date of any adoption or revision of rules required to be promulgated by the Resource Conservation and Recovery Act.

(c) Notwithstanding any other provision in this article, the director shall not promulgate rules which are more properly within the jurisdiction and expertise of any of the agencies empowered with rule-making authority pursuant to section seven [§ 22-18-7] of this article. (1994, c. 61.)

Editor's notes. — The Resource Conservation and Recovery Act, referred to above, is compiled in 42 U.S.C. § 6901 et seq.

The fed[illegible]rine Protection, Research and Sanctuari[illegible]ferred to above, is compiled in 16 U.S.C[illegible]1 — 1434, 33 U.S.C. § 1401 et seq.

The Solid Waste Disposal Act is codified in 42 U.S.C. § 3251 et seq.

W. Va. Law Review. — Flannery and Poland, "Hazardous Waste Management Act — Closing the Circle," 84 W. Va. L. Rev. 347 (1982).

§ 22-18-7. Authority and jurisdiction of other state agencies.

(a) The commissioner of the division of highways, in consultation with the director, and avoiding inconsistencies with and avoiding duplication to the maximum extent practicable with legislative rules required to be promulgated pursuant to this article by the director or any other rule-making authority, and in accordance with the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code, shall promulgate, as necessary, legislative rules governing the transportation of hazardous wastes by vehicle upon the roads and highways of this state. Such legislative rules shall be consistent with applicable rules issued by the federal department of transportation and consistent with this article: Provided, That such legislative rules apply to the interstate transportation of hazardous waste within the boundaries of this state, as well as the intrastate transportation of such waste.

In lieu of those enforcement and inspection powers conferred upon the commissioner of the division of highways elsewhere by law with respect to the transportation of hazardous waste, the commissioner of the division of highways has the same enforcement and inspection powers as those granted to the director, or authorized representative or agent, or any authorized employee or agent of the division, as the case may be, under sections twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen [§§ 22-18-12, 22-18-13, 22-18-14, 22-18-15, 22-18-16, 22-18-17 and 22-18-18] of this article. The limitations of this subsection do not affect in any way the powers of the division of highways with respect to weight enforcement.

(b) The public service commission, in consultation with the director, and avoiding inconsistencies with and avoiding duplication to the maximum extent practicable with rules required to be promulgated pursuant to this article by the director or any other rule-making authority, and in accordance with the provisions of chapter twenty-nine-a of this code, shall promulgate, as necessary, rules governing the transportation of hazardous wastes by railroad in this state. Such rules shall be consistent with applicable rules and regulations issued by the federal department of transportation and consistent with this article: Provided, That such rules apply to the interstate transportation of hazardous waste within the boundaries of this state, as well as the intrastate transportation of such waste.

In lieu of those enforcement and inspection powers conferred upon the public service commission elsewhere by law with respect to the transportation of hazardous waste, the public service commission has the same enforcement and inspection powers as those granted to the director or authorized representative or agent or any authorized employee or agent of the division, as the case may be, under sections twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen of this article.

(c) The rules required to be promulgated pursuant to subsec[illegible] and (b) of this section apply equally to those persons transporting h[illegible] wastes generated by others and to those transporting hazardous waste[illegible]ey have [illegible]

standards, applicable to transporters of hazardous waste identified or listed under this article, as may be necessary to protect public health, safety and the environment. Such standards shall include, but need not be limited to, requirements respecting (A) record keeping concerning such hazardous waste transported, and its source and destination; (B) transportation of such waste only if properly labeled; (C) compliance with the manifest system referred to in subdivision (3), subsection (a), section six [§ 22-18-6(a)(3)] of this article; and (D) transportation of all such hazardous waste only to the hazardous waste treatment, storage or disposal facilities which the shipper designates on the manifest form to be a facility holding a permit issued under: (1) This article or any rule required by this article to be promulgated; (2) Subtitle C; (3) the laws of any other state which has an authorized hazardous waste program pursuant to section 3006 of the Resource Conservation and Recovery Act; or (4) Title I of the Federal Marine Protection, Research and Sanctuaries Act.

(d) The secretary of the department of health and human resources, in consultation with the director, and avoiding inconsistencies with and avoiding duplication to the maximum extent practicable with legislative rules required to be promulgated pursuant to this article by the director or any other rule-making authority, shall promulgate rules pursuant to article five-j [§ 20-5J-1 et seq.], chapter twenty of this code. The secretary of the department of health and human resources shall have the same enforcement and inspection powers as those granted to the director or agent or any authorized employee or agent of the division, as the case may be, under sections twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen of this article, and in addition thereto, the department of health and human resources shall have those inspection and enforcement powers with respect to hazardous waste with infectious characteristics as provided for in article five-j, chapter twenty of this code.

(e) The environmental quality board, in consultation with the director, and in accordance with the provisions of chapter twenty-nine-a of this code, shall, as necessary, promulgate water quality standards governing discharges into the waters of this state of hazardous waste resulting from the treatment, storage or disposal of hazardous waste as may be required by this article. The standards shall be consistent with this article.

(f) All legislative rules promulgated pursuant to this section shall be consistent with rules and regulations promulgated by the federal environmental protection agency pursuant to the resource conservation and recovery act.

(g) The director shall submit written comments to the legislative rule-making review committee regarding all legislative rules promulgated pursuant to this article. (1994, c. 61.)

Editor's notes. — The Resource Conservation and Recovery Act, referred to above, is compiled in 42 U.S.C. § 6901 et seq.

The federal Marine Protection, Research and Sanctuaries Act, referred to above, is compiled in 16 U.S.C. §§ 1431 — 1434, 33 U.S.C. § 1401 et seq.

§ 22-18-8. Permit process; undertaking activities without a permit.

(a) No person may own, construct, modify, operate or close any facility or site for the treatment, storage or disposal of hazardous waste identified or listed under this article, nor shall any person store, treat or dispose of any such hazardous waste without first obtaining a permit from the director for such facility, site or activity and all other permits as required by law. Such permit shall be issued, after public notice and opportunity for public hearing, upon such reasonable terms and conditions as the director may direct if the application, together with all supporting information and data and other evidence establishes that the construction, modification, operation or closure, as the case may be, of the hazardous waste facility, site or activity will not violate any provisions of this article or any of the rules promulgated by the director as required by this article: Provided, That in issuing the permits required by this subsection, the director shall not regulate those aspects of a hazardous waste treatment, storage or disposal facility which are the subject of the permitting or licensing requirements of: (1) section seven [§ 22-18-7] of this article, and which need not be regulated in order for the director to perform his or her duties under this article; or (2) subdivision (13), subsection (a), section six [§ 22-18-6(a)(13)] of this article, which need not be regulated under any other provision of this article.

(b) The director shall prescribe a form of application for all permits issued by the director.

(c) The director may require a plan for the closure of such facility or site to be submitted along with an application for a permit which plan for closure shall comply in all respects with the requirements of this article and any rules promulgated hereunder. Such plan of closure is subject to modification upon application by the permit holder to the director and approval of such modification by the director.

(d) An environmental analysis shall be submitted with the permit application for all hazardous waste treatment, storage or disposal facilities which are major facilities as that term may be defined by rules promulgated by the director: Provided, That facilities in existence on the nineteenth day of November, one thousand nine hundred eighty, need not comply with this subsection. Such environmental analysis shall contain information of the type, quality and detail that will permit adequate consideration of the environmental, technical and economic factors involved in the establishment and operation of such facilities:

(1) The portion of the applicant's environmental analysis dealing with environmental assessments shall contain, but not be limited to:

(A) The potential impact of the method and route of transportation of hazardous waste to the site and the potential impact of the establishment and operation of such facilities on air and water quality, existing land use, transportation and natural resources in the area affected by such facilities;

(B) A description of the expected effect of such facilities; and

(C) Recommendations for minimizing any adverse impact

(2) The portion of the applicant's environmental analysis dealing with technical and economic assessments shall contain, but not be limited to:

(A) Detailed descriptions of the proposed site and facility, including site location and boundaries and facility purpose, type, size, capacity and location on the site and estimates of the cost and charges to be made for material accepted, if any;

(B) Provisions for managing the site following cessation of operation of the facility; and

(C) Qualifications of owner and operation, including a description of the applicant's prior experience in hazardous waste management operations.

(e) Any person undertaking, without a permit, any of the activities for which a permit is required under this section or under section seven of this article, or any person violating any term or condition under which a permit has been issued pursuant to this section or pursuant to section seven of this article, is subject to the enforcement procedures of this article.

(f) Notwithstanding any provision to the contrary in subsections (a) through (e) of this section or section seven of this article, any surface coal mining and reclamation operation that has a permit covering any coal mining wastes or overburden which has been issued or approved under article three [§ 22-3-1 et seq.] of this chapter, shall be considered to have all necessary permits issued pursuant to this article with respect to the treatment, storage or disposal of such wastes or overburden. Rules promulgated under this article are not applicable to treatment, storage or disposal of coal mining wastes and overburden which are covered by such a permit. (1994, c. 61.)

§ 22-18-9. Corrective action.

(a) All permits issued after the date the state is delegated authority by the federal environmental protection agency to administer the portion of the federal hazardous waste program covered under the Hazardous and Solid Waste Amendments of 1984 shall contain conditions requiring corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility seeking a permit under this article regardless of the time at which waste was placed in such unit. Permits issued under this article shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

(b) The director shall amend the standards under subdivision (4), subsection (a), section six [§ 22-18-6(a)(4)] of this article, regarding corrective action required at facilities for the treatment, storage or disposal of hazardous waste listed or identified in rules promulgated pursuant to subdivision (2), subsection (a), section six [§ 22-8-6(a)(2)] of this article, to require that corrective action be t[illegible] beyond the facility boundary where necessary to protect hum[illegible] health[illegible] the environment unless the owner or operator of the faci[illegible] concerned dem[illegible]trates to the satisfaction of the director that, despite th[illegible] to obtain the

necessary permission to undertake such action. Such rules shall take effect immediately upon promulgation, and shall apply to:

(1) All facilities operating under permits issued under subdivision (4), subsection (a), section six of this article; and

(2) All landfills, surface impoundments and waste pile units (including any new units, replacement of existing units or lateral expansions of existing units) which receive hazardous waste after the twenty-sixth day of July, one thousand nine hundred eighty-two. Pending promulgation of such rules the director shall issue corrective action orders for facilities referred to in subdivisions (1) and (2) above on a case-by-case basis consistent with the purposes of this subsection. (1994, c. 61.)

Editor's notes. — The federal Hazardous and Solid Waste Amendments of 1984, referred to in (a), are compiled in 42 U.S.C. § 6901 et seq.

§ 22-18-10. Public participation in permit process.

Before the issuing of a permit to any person with respect to any facility for the treatment, storage or disposal of hazardous waste under sections seven or eight [§ 22-18-7 or § 22-18-8] of this article, the director or other permit issuing authority shall:

(a) Cause to be published as a Class I-O legal advertisement in a newspaper of general circulation, and the publication area is the county wherein the real estate or greater portion thereof is situate, and broadcast over local radio stations notice of the director's or other permit issuing authority's intention to issue such permit; and

(b) Transmit written notice of the director's or other permit issuing authority's intention to issue such permit to each unit of local government having jurisdiction over the area in which such facility is proposed to be located and to each state agency having any authority under state law with respect to the construction or operation of such facility.

If within forty-five days the director or other permit issuing authority receives written notice of opposition to the director's or other permit issuing authority's intention to issue such permit and a request for a hearing, or if the director or other permit issuing authority determines on his or her own initiative, to have a hearing he or she shall hold an informal public hearing (including an opportunity for presentation of written and oral views) on whether he or she should issue a permit for the proposed facility. Whenever possible the director or other permit issuing authority shall schedule such hearing at a location convenient to the nearest population center to such proposed facility and give notice in the aforementioned manner of the date, time and subject matter of such hearing. (1994, c. 61.)

§ 22-18-11. Transition program for existing facilities.

Any person who owns or operates a facility required to [illegible]y permit under this article, which facility was in existence on the ninth da[illegible] of July, one

permit until such time as final administrative disposition is made with respect to an application for such permit: Provided, That on said date such facility is operating and continues to operate in compliance with the interim status requirement of the federal environmental protection agency established pursuant to section 3005 of the federal Solid Waste Disposal Act, as amended, if applicable, and in such a manner as will not cause or create a substantial risk of a health hazard or public nuisance or a significant adverse effect upon the environment: Provided, however, That the owner or operator of such facility shall make a timely and complete application for such permit in accordance with rules promulgated pursuant to this article specifying procedures and requirements for obtaining such permit. (1994, c. 61.)

Editor's notes. — The federal Solid Waste Disposal Act, referred to above, is compiled in 42 U.S.C. § 6901 et seq.

§ 22-18-12. Confidential information.

Information obtained by any agency under this article shall be available to the public unless the director certifies such information to be confidential. The director may make such certification where any person shows, to the satisfaction of the director, that the information or parts thereof, if made public, would divulge methods, processes or activities entitled to protection as trade secrets. Nothing in this section may be construed as limiting the disclosure of information by the division to any officer, employee or authorized representative of the state or federal government concerned with effecting the purposes of this article.

Any person who knowingly and willfully divulges or discloses any information entitled to protection under this section is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five thousand dollars, or imprisoned in the county jail for not more than six months, or both fined and imprisoned. (1994, c. 61.)

§ 22-18-13. Inspections; right of entry; sampling; reports and analyses; subpoenas.

(a) The director or any authorized representative, employee or agent of the division, upon the presentation of proper credentials and at reasonable times, may enter any building, property, premises, place, vehicle or permitted facility where hazardous wastes are or have been generated, treated, stored, transported or disposed of for the purpose of making an investigation with reasonable promptness to ascertain the compliance by any person with the provisions of this article or the rules promulgated by the director or permits issued by the director hereunder. Nothing contained in this section eliminates any obligation to follow any process that may be required by law.

(b) The director or his or her authorized representative, employee or agent shall make periodic inspections at every permitted facility as necessary to effectively implement and enforce the requirements of this article or the rules

an inspection is made, a report shall be prepared and filed with the director and a copy of such inspection report shall be promptly furnished to the person in charge of such building, property, premises, place, vehicle or facility. Such inspection reports shall be available to the public in accordance with the provisions of article one [§ 29B-1-1 et seq.], chapter twenty-nine-b of this code.

(c) Whenever the director has cause to believe that any person is in violation of any provision of this article, any condition of a permit issued by the director, any order or any rule promulgated by the director under this article, he or she shall immediately order an inspection of the building, property, premises, place, vehicle or permitted facility at which the alleged violation is occurring.

(d) The director or any authorized representative, employee or agent of the division may, upon presentation of proper credentials and at reasonable times, enter any establishment, building, property, premises, vehicle or other place maintained by any person where hazardous wastes are being or have been generated, transported, stored, treated or disposed of to inspect and take samples of wastes, soils, air, surface water and groundwater and samples of any containers or labelings for such wastes. In taking such samples, the division may utilize such sampling methods as it determines to be necessary, including, but not limited to, soil borings and monitoring wells. If the representative, employee or agent obtains any such samples, prior to leaving the premises, he or she shall give to the owner, operator or agent in charge a receipt describing the sample obtained and, if requested, a portion of each such sample equal in volume or weight to the portion retained. The division shall promptly provide a copy of any analysis made to the owner, operator or agent in charge.

(e) Upon presentation of proper credentials and at reasonable times, the director or any authorized representative, employee or agent of the division shall be given access to all records relating to the generation, transportation, storage, treatment or disposal of hazardous wastes in the possession of any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled such waste, the director or an authorized representative, employee or agent shall be furnished with copies of all such records or given the records for the purpose of making copies. If the director, upon inspection, investigation or through other means, observes or learns of a violation or probable violation of this article, he or she is authorized to issue subpoenas and subpoenas duces tecum and to order the attendance and testimony of witnesses and to compel the production of any books, papers, documents, manifests and other physical evidence pertinent to such investigation or inspection. (1994, c. 61.)

§ 22-18-14. Monitoring, analysis and testing.

(a) If the director determines, upon receipt of any information, that (1) the presence of any hazardous waste at a facility or site at which hazardous waste is, or has been, stored, treated or disposed of, or (2) the release of any such waste from such facility or site may present a substantial hazard to human

[illegible] may issue an order requiring the owner

or operator of such facility or site to conduct such monitoring, testing, analysis and reporting with respect to such facility or site as the director deems reasonable to ascertain the nature and extent of such hazard.

(b) In the case of any facility or site not in operation at the time a determination is made under subsection (a) of this section with respect to the facility or site, if the director finds that the owner of such facility or site could not reasonably be expected to have actual knowledge of the presence of hazardous waste at such facility or site and of its potential for release, he or she may issue an order requiring the most recent previous owner or operator of such facility or site who could reasonably be expected to have such actual knowledge to carry out the actions referred to in subsection (a) of this section.

(c) An order under subsection (a) or (b) of this section shall require the person to whom such order is issued to submit to the director within thirty days from the issuance of such order a proposal for carrying out the required monitoring, testing, analysis and reporting. The director may, after providing such person with an opportunity to confer with the director respecting such proposal, require such person to carry out such monitoring, testing, analysis and reporting in accordance with such proposal, and such modifications in such proposal as the director deems reasonable to ascertain the nature and extent of the hazard.

(d) The following duties shall be carried out by the director:

(1) If the director determines that no owner or operator referred to in subsection (a) or (b) of this section is able to conduct monitoring, testing, analysis or reporting satisfactory to the director, if the director deems any such action carried out by an owner or operator to be unsatisfactory or if the director cannot initially determine that there is an owner or operator referred to in subsection (a) or (b) of this section who is able to conduct such monitoring, testing, analysis or reporting, he or she may conduct monitoring, testing or analysis (or any combination thereof) which he or she deems reasonable to ascertain the nature and extent of the hazard associated with the site concerned, or authorize a state or local authority or other person to carry out any such action, and require, by order, the owner or operator referred to in subsection (a) or (b) of this section to reimburse the director or other authority or person for the costs of such activity.

(2) No order may be issued under this subsection requiring reimbursement of the costs of any action carried out by the director which confirms the results of the order issued under subsection (a) or (b) of this section.

(e) If the monitoring, testing, analysis and reporting conducted pursuant to this section indicates that a potential hazard to human health or the environment may or does exist, the director may issue an appropriate order requiring that the hazard or risk of hazard be eliminated.

(f) The director may commence a civil action against any person who fails or refuses to comply with any order issued under this section. Such action shall be brought in the circuit court in which the defendant is located, resides or is doing business. Such court has jurisdiction to require compliance with such order and to assess a civil penalty of not to exceed five thousand dollars for

§ 22-18-15. Enforcement orders; hearings.

(a) If the director, upon inspection, investigation or through other means observes, discovers or learns of a violation of the provisions of this article, any permit, order or rules issued or promulgated hereunder, he or she may:

(1) Issue an order stating with reasonable specificity the nature of the violation and requiring compliance immediately or within a specified time. An order under this section includes, but is not limited to, any or all of the following: Orders suspending, revoking or modifying permits, orders requiring a person to take remedial action or cease and desist orders;

(2) Seek an injunction in accordance with subsection (c) of section seventeen [§ 22-18-17(c)] of this article;

(3) Institute a civil action in accordance with subsection (c) of section seventeen of this article; or

(4) Request the attorney general, or the prosecuting attorney of the county in which the alleged violation occurred, to bring a criminal action in accordance with section sixteen [§ 22-18-16] of this article.

(b) Any person issued a cease and desist order may file a notice of request for reconsideration with the director not more than seven days from the issuance of such order and shall have a hearing before the director contesting the terms and conditions of such order within ten days of the filing of such notice of a request for reconsideration. The filing of a notice of request for reconsideration does not stay or suspend the execution or enforcement of such cease and desist order. (1994, c. 61.)

§ 22-18-16. Criminal penalties.

(a) Any person who knowingly (1) transports any hazardous waste identified or listed under this article to a facility which does not have a permit required by this article, section 3005 of the Federal Solid Waste Disposal Act, as amended, the laws of any other state which has an authorized hazardous waste program pursuant to section 3006 of the federal Solid Waste Disposal Act, as amended, or Title I of the federal Marine Protection, Research and Sanctuaries Act; (2) treats, stores or disposes of any such hazardous waste either (A) without having obtained a permit required by this article, or by Title I of the federal Marine Protection, Research and Sanctuaries Act, or by section 3005 or 3006 of the federal Solid Waste Disposal Act, as amended, or (B) in knowing violation of a material condition or requirement of such permit, is guilty of a felony, and, upon conviction thereof, shall be fined not to exceed fifty thousand dollars for each day of violation or confined in the penitentiary not less than one nor more than two years, or both such fine and imprisonment or, in the discretion of the court, be confined in jail not more than one year in addition to the above fine.

(b) Any person who knowingly (1) makes any false material statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained or used for purposes of compliance with this article; or (2) generates, stores, treats, transports, disposes of, exports or otherwise handles any hazardous waste identified or listed under this article (whether

such activity took place before or takes place after the effective date of this article) and who knowingly destroys, alters or conceals any record required to be maintained under rules promulgated by the director pursuant to this article, is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not to exceed twenty-five thousand dollars, or sentenced to imprisonment for a period not to exceed one year, or both fined and sentenced to imprisonment for each violation.

(c) Any person convicted of a second or subsequent violation of subsections (a) and (b) of this section, is guilty of a felony, and, upon such conviction, shall be confined in the penitentiary not less than one nor more than three years, or fined not more than fifty thousand dollars for each day of violation, or both such fine and imprisonment.

(d) Any person who knowingly transports, treats, stores or disposes of any hazardous waste identified or listed pursuant to this article in violation of subsection (a) of this section, or having applied for a permit pursuant to subdivision (13), subsection (a), section six [§ 22-18-6(a)(13)] or sections seven and eight [§§ 22-18-7 and 22-18-8] of this article, and knowingly either (1) fails to include in a permit application any material information required pursuant to this article, or rules promulgated hereunder, or (2) fails to comply with applicable interim status requirements as provided in section eleven [§ 22-18-11] of this article and who thereby exhibits an unjustified and inexcusable disregard for human life or the safety of others and he or she thereby places another person in imminent danger of death or serious bodily injury, is guilty of a felony, and, upon conviction thereof, shall be fined not more than two hundred fifty thousand dollars or imprisoned not less than one year nor more than four years or both such fine and imprisonment.

(e) As used in subsection (d) of this section, the term "serious bodily injury" means:

(1) Bodily injury which involves a substantial risk of death;

(2) Unconsciousness;

(3) Extreme physical pain;

(4) Protracted and obvious disfigurement; or

(5) Protracted loss or impairment of the function of a bodily member, organ or mental faculty. (1994, c. 61.)

Editor's notes. — Subsection (b) refers to "the effective date of this article." Acts 1994, c. 61, which enacted this article, passed March 12, 1994 and became effective ninety days from passage.

The federal Solid Waste Disposal Act, referred to in (a), is compiled in 42 U.S.C. § 6901 et seq.

The federal Marine Protection, Research and Sanctuaries Act, referred to in (a), is compiled in 16 U.S.C. §§ 1431 — 1434, 33 U.S.C. § 1401 et seq.

W. Va. Law Review. — Flannery and Poland, "Hazardous Waste Management Act — Closing the Circle," 84 W. Va. L. Rev. 347 (1982).

§ 22-18-17. Civil penalties and injunctive relief.

(a) (1) Any person who violates any provision of this article, any permit or any rule or order issued pursuant to this article is subject to a civil administrative penalty not to exceed a maximum of twenty-two thousand five hundred dollars for each day of such violation, not to exceed a maximum of twenty-two thousand five hundred dollars. In assessing any such penalty, the director shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements as well as any other appropriate factors as may be established by the director by rules promulgated pursuant to this article and article three [§ 29A-3-1 et seq.], chapter twenty-nine-a of this code. No assessment shall be levied pursuant to this subsection until after the alleged violator has been notified by certified mail or personal service. The notice shall include a reference to the section of the statute, rule, order or statement of permit conditions that was allegedly violated, a concise statement of the facts alleged to constitute the violation, a statement of the amount of the administrative penalty to be imposed and a statement of the alleged violator's right to an informal hearing. The alleged violator has twenty calendar days from receipt of the notice within which to deliver to the director a written request for an informal hearing. If no hearing is requested, the notice becomes a final order after the expiration of the twenty-day period. If a hearing is requested, the director shall inform the alleged violator of the time and place of the hearing. The director may appoint an assessment officer to conduct the informal hearing and then make a written recommendation to the director concerning the assessment of a civil administrative penalty. Within thirty days following the informal hearing, the director shall issue and furnish to the violator a written decision, and the reasons therefor, concerning the assessment of a civil administrative penalty. Within thirty days after notification of the director's decision, the alleged violator may request a formal hearing before the environmental quality board in accordance with the provisions of article one [§ 22B-1-1 et seq.], chapter twenty-two-b of this code. The authority to levy an administrative penalty is in addition to all other enforcement provisions of this article and the payment of any assessment does not affect the availability of any other enforcement provision in connection with the violation for which the assessment is levied: Provided, That no combination of assessments against a violator under this section shall exceed twenty-five thousand dollars per day of each such violation: Provided, however, That any violation for which the violator has paid a civil administrative penalty assessed under this section shall not be the subject of a separate civil penalty action under this article to the extent of the amount of the civil administrative penalty paid. All administrative penalties shall be levied in accordance with rules issued pursuant to subsection (a) of section six [§ 22-18-6(a)] of this article. The net proceeds of assessments collected pursuant to this subsection shall be deposited in the hazardous waste emergency response fund established pursuant to section three [§ 22-19-3], article nineteen of this chapter.

(2) No assessment levied pursuant to subdivision (1), subsection (a) above becomes due and payable until the procedures for review of such assessment as set out in said subsection have been completed.

(b) Any person who violates any provision of this article, any permit or any rule or order issued pursuant to this article is subject to a civil penalty not to exceed twenty-five thousand dollars for each day of such violation, which penalty shall be recovered in a civil action either in the circuit court wherein the violation occurs or in the circuit court of Kanawha County.

(c) The director may seek an injunction, or may institute a civil action against any person in violation of any provisions of this article or any permit, rule or order issued pursuant to this article. In seeking an injunction, it is not necessary for the director to post bond nor to allege or prove at any stage of the proceeding that irreparable damage will occur if the injunction is not issued or that the remedy at law is inadequate. An application for injunctive relief or a civil penalty action under this section may be filed and relief granted notwithstanding the fact that all administrative remedies provided for in this article have not been exhausted or invoked against the person or persons against whom such relief is sought.

(d) Upon request of the director, the attorney general, or the prosecuting attorney of the county in which the violation occurs, shall assist the director in any civil action under this section.

(e) In any action brought pursuant to the provisions of this section, the state, or any agency of the state which prevails, may be awarded costs and reasonable attorney's fees. (1994, c. 61.)

§ 22-18-18. Imminent and substantial hazards; orders; penalties; hearings.

(a) Notwithstanding any provision of this article to the contrary, the director, upon receipt of information, or upon observation or discovery that the handling, storage, transportation, treatment or disposal of any hazardous waste may present an imminent and substantial endangerment to public health, safety or the environment, may:

(1) Request the attorney general or the appropriate prosecuting attorney to commence an action in the circuit court of the county in which the hazardous condition exists to immediately restrain any person contributing to such handling, storage, transportation, treatment or disposal to stop such handling, storage, transportation, treatment or disposal or to take such other action as may be necessary; or

(2) Take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

(b) Any person who willfully violates, or fails or refuses to comply with, any order of the director under subsection (a) of this section may, in an action brought in the appropriate circuit court to enforce such orders, be fined not more than five thousand dollars for each day in which such violation occurs or such failure to comply continues. (1994, c. 61.)

§ 22-18-19. Citizen suits; petitions for rule making; intervention.

(a) Any person may commence a civil action on his or her own behalf against any pe[illegible]ho is alleged to be in violation of any provision of this article o[illegible] any co[illegible]of a permit issued or rules promulgated hereunder, except tha[illegible] no action [illegible]y be commenced under this section prior to sixty days after the

rule-making authority and to the person against whom the action will be commenced, or if the state has commenced and is diligently prosecuting a civil or criminal action pursuant to this article: Provided, That such person may commence a civil action immediately upon notification in the case of an action under subsection (b) of this section. Such actions may be brought in the circuit court in the county in which the alleged violation occurs or in the circuit court of Kanawha County.

(b) Any person may commence a civil action against the appropriate enforcement, permit issuing or rule-making authority where there is alleged a failure of such authority to perform any nondiscretionary duty or act under this article. Such actions may be brought only in the circuit court of Kanawha County.

(c) Any person may petition the appropriate rule-making authority for rule-making on an issue arising under this article. The appropriate rule-making authority, if it believes such issue to merit rule making, may commence any studies and investigations necessary to issue rules. A decision by the appropriate rule-making authority not to pursue rule making must be set forth in writing with substantial reasons for refusing to do so.

(d) Nothing in this article restricts any rights of any person or class of persons under statute or common law.

(e) In issuing any final order in any action brought pursuant to this section any court with jurisdiction may award costs of litigation, including reasonable attorney's fees and expert witnesses fees, to any party whenever the court determines such award to be appropriate.

(f) Any enforcement, permit issuing or rule-making authority may intervene as a matter of right in any suit brought under this section.

(g) Any person may intervene as a matter of right in any civil action or administrative action instituted under this article.

(h) Notwithstanding any provision of this article to the contrary, any person may maintain an action to enjoin a nuisance against any permit holder or other person subject to the provisions of this article and may seek damages in said action, all to the same extent and for all intents and purposes as if this article were not enacted, if such person maintaining such action and seeking such damages would otherwise have standing to maintain such action and be entitled to damages by any other rule of law. (1994, c. 61.)

W. Va. Law Review. — Flannery and Poland, "Hazardous Waste Management Act — Closing the Circle," 84 W. Va. L. Rev. 347 (1982).

State or federal preemption. — Since both the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(f), and the West Virginia Hazardous Waste Management Act, former § 20-5E-18(d) and (h), see now this section, have provisions preserving common law actions, including nuisance actions, an ordinance passed by a municipality declaring the permanent disposal of hazardous wastes as therein defined to be a public nuisance is not preempted by the federal or State acts. Sharon Steel Corp. v. City of Fairmont, 334 S.E.2d 616 (W. Va. 1985), appeal dismissed, 474 U.S. 1098, 106 S. Ct. 875, 88 L. Ed. 2d 912 (1986).

§ 22-18-20. Appeal to environmental quality board.

Any person aggrieved or adversely affected by an order [illegible]ector made and entered in accordance with the provisions of this article, or by the failure

or refusal of the director to act within a reasonable time on an application for a permit or by the issuance or denial of or by the terms and conditions of a permit granted by the director under the provisions of this article, may appeal to the environmental quality board, in accordance with the provisions of article one [§ 22B-1-1 et seq.], chapter twenty-two-b of this code. (1994, c. 61.)

§ 22-18-21. Disclosures required in deeds and leases.

(a) The grantor in any deed or other instrument of conveyance or any lessor in any lease or other instrument whereby any real property is let for a period of time shall disclose in such deed, lease or other instrument the fact that such property or the subsurface of such property, (whether or not the grantor or lessor is at the time of such conveyance or lease the owner of such subsurface) was used for the storage, treatment or disposal of hazardous waste. The provisions of this subsection only apply to those grantors or lessors who owned or had an interest in the real property when the same or the subsurface thereof was used for the purpose of storage, treatment or disposal of hazardous waste or who have actual knowledge that such real property or the subsurface thereof was used for such purpose or purposes at any time prior thereto.

(b) Any grantee of real estate or of any substrata underlying said real estate or any lessee for a term who intends to use the real estate conveyed or let or any substrata underlying the same for the purpose of storing, treating or disposing of hazardous waste shall disclose in writing at the time of such conveyance or lease or within thirty days prior thereto such fact to the grantor or lessor of such real estate or substrata. Such disclosure shall describe the proposed location upon said property of the site to be used for the storage, treatment or disposal of hazardous waste, the identity of such waste, the proposed method of storage, treatment or disposal to be used with respect to such waste and any and all other information required by rules of the director. (1994, c. 61.)

§ 22-18-22. Appropriation of funds; hazardous waste management fund.

The net proceeds of all fines, penalties and forfeitures collected under this article shall be appropriated as directed by article XII, section 5 of the constitution of West Virginia. For the purposes of this section, the net proceeds of such fines, penalties and forfeitures shall be deemed the proceeds remaining after deducting therefrom those sums appropriated by the Legislature for defraying the cost of administering this article. All permit application fees collected under this article shall be paid into the state treasury into a special fund designated "The Hazardous Waste Management Fund." In making the appropriation for defraying the cost of administering this article, the Legislature shall first take into account the sums included in such special fund prior to deducting such additional sums as may be needed from the fines, penalties and forfeitures collected pursuant to this article. (1994, c. 61.)

§ 22-18-23. State program to be consistent with and equivalent to federal program.

The program for the management of hazardous waste pursuant to this article shall be equivalent to and consistent with the federal program established pursuant to Subtitle C of the federal Solid Waste Disposal Act, as amended. (1994, c. 61.)

Editor's notes. — The federal Solid Waste Disposal Act, referred to above, as compiled in 42 U.S.C. § 6901 et seq.

W. Va. Law Review. — Flannery and Poland, "Hazardous Waste Management Act — Closing the Circle," 84 W. Va. L. Rev. 347 (1982).

§ 22-18-24. Duplication of enforcement prohibited.

No enforcement proceeding brought pursuant to this article may be duplicated by an enforcement proceeding subsequently commenced under some other article of this code with respect to the same transaction or event unless such subsequent proceeding involves the violation of a permit or permitting requirement of such other article. (1994, c. 61.)

§ 22-18-25. Financial responsibility provisions.

(1) Financial responsibility required by subdivision (4), subsection (a), section six [§ 22-18-6(a)(4)] of this article may be established in accordance with rules promulgated by the director by any one, or any combination, of the following: Insurance, guarantee, surety bond, letter of credit or qualification as a self-insurer. In promulgating requirements under this section, the director is authorized to specify policy or other contractual terms, conditions or defenses which are necessary or are unacceptable in establishing such evidence of financial responsibility in order to effectuate the purposes of this article.

(2) In any case where the owner or operator is in bankruptcy reorganization, or arrangement pursuant to the federal bankruptcy code or where (with reasonable diligence) jurisdiction in any state court or any federal court cannot be obtained over an owner or operator likely to be solvent at the time of judgment, any claim arising from conduct for which evidence of financial responsibility must be provided under this section may be asserted directly against the guarantor providing such evidence of financial responsibility. In the case of any action pursuant to this subsection, such guarantor is entitled to invoke all rights and defenses which would have been available to the owner or operator if any action had been brought against the owner or operator by the claimant and which would have been available to the guarantor if an action had been brought against the guarantor by the owner or operator.

(3) The total liability of any guarantor is limited to the aggregate amount which the guarantor has provided as evidence of financial responsibility to the owner or operator under this article. Nothing in this subsection limits any other state or federal statutory contractual or common law liability of a guarantor to its owner or operator including, but not limited to, the liability of such guarantor for bad faith either in negotiating or in failing to negotiate the settlement of any claim. Nothing in this subsection diminishes the liability of

any person under section 107 or 111 of the Comprehensive Environmental Response Compensation and Liability Act of 1980 or other applicable law.

(4) For the purposes of this section, the term "guarantor" means any person other than the owner or operator who provides evidence of financial responsibility for an owner or operator under this section. (1994, c. 61.)

Editor's notes. — The Comprehensive Environmental Response Compensation and Liability Act of 1980, referred to in (3), is compiled in 42 U.S.C. § 9604 et seq.

ARTICLE 19.

HAZARDOUS WASTE EMERGENCY RESPONSE FUND.

§ 22-19-1. Findings; purpose.

The Legislature recognizes that large quantities of hazardous waste are generated within the state, and that emergency situations involving hazardous waste can and will arise which may present a hazard to human health, safety or the environment. The Legislature also recognizes that some hazardous waste has been stored, treated or disposed of at sites in the state in a manner insufficient to protect human health, safety or the environment. The Legislature further recognizes that the federal government has enacted the Comprehensive Environmental Response, Compensation and Liability Act of 1980, which provides for federal assistance to respond to hazardous substance emergencies and to remove and remedy the threat of damage to the public health or welfare or to the environment, and declares that West Virginia desires to produce revenue for matching the federal assistance provided under the federal act. Therefore, the Legislature hereby creates a hazardous waste emergency fund to provide state funds for responding to hazardous waste emergencies, matching federal financial assistance for restoring hazardous waste sites and other costs or expenses incurred in the administration of this article. (1994, c. 61.)

Editor's notes. — The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, referred to above, is codified as 42 U.S.C. § 6911a.

§ 22-19-2. Definitions.

As used in this article, unless the context clearly requires a different meaning:

(1) "Cleanup" means such actions as may be necessary to monitor, assess and evaluate the threat of release of hazardous waste, the containment, collection, control, identification, treatment, dispersal, removal or disposal of hazardous waste or other such actions as may be necessary to respond to hazardous waste emergencies or to prevent, minimize or mitigate damage to the public health, safety, welfare or to the environment, and includes, where necessary, replacement of existing, or provision of alternative, drinking water supplies that have been contaminated with hazardous waste as a result of an emergency;

(2) "Cleanup costs" means all costs incurred by the director, or with the approval of the director, by any state agency or person participating in the cleanup of a hazardous waste emergency or remedial action;

(3) "Generator" means any person, corporation, partnership, association or other legal entity, by site location, whose act or process produces hazardous waste as identified or listed by the director in rules promulgated pursuant to section six [§ 22-18-6], article eighteen of this chapter, in an amount greater than twelve thousand kilograms per year;

All other terms have the meaning as prescribed in the rules promulgated by the director pursuant to the provisions of section six, article eighteen of this chapter. (1994, c. 61.)

§ 22-19-3. Hazardous waste emergency response fund; components of fund.

(a) The special fund designated "The Hazardous Waste Emergency Response Fund," hereinafter referred to as "the fund," shall be continued in the state treasury.

(b) All generator fee assessments, any interest or surcharge assessed and collected by the director, interest accruing on investments and deposits of the fund, and any other moneys designated shall be paid into the fund. (1994, c. 61.)

§ 22-19-4. Fee assessments; tonnage fees; due dates of payments; interest on unpaid fees.

(a) Each generator of hazardous waste within this state shall pay an annual fee based upon the amount of hazardous waste generated as reported to the director by the generator on a fee assessment form prescribed by the director submitted pursuant to article eighteen [§ 22-18-1 et seq.] of this chapter. The director shall establish a fee schedule according to the following: Full assessment for generated hazardous waste disposed or treated off-site; ninety percent of the full assessment for generated hazardous waste eit[illegible]ted or disposed on-site; seventy-five percent of the full assessment [illegible]rated hazardous waste treated off-site so that such waste is rendered no[illegible]rdous;

and twenty-five percent of the full assessment for generated hazardous waste treated on-site so that such waste is rendered nonhazardous: Provided, That the generator fee assessment does not apply to the following: (1) Those wastes listed in paragraph (A), subdivision two, subsection (a), section six [§ 22-18-6(a)(2)(A)], article eighteen of this chapter; (2) sludge from any publicly owned treatment works in the state; (3) any discharge to waters of the state of hazardous waste pursuant to a valid water pollution control permit issued under federal or state law; (4) any hazardous wastes beneficially used or reused or legitimately recycled or reclaimed; (5) hazardous wastes which are created or retrieved pursuant to an emergency or remedial action plan; (6) hazardous wastes whose sole characteristic as a hazardous waste is based on corrosivity and which are subjected to on-site elementary neutralization in containers or tanks.

(b) Each generator of hazardous waste within the state subject to a fee assessment under subsection (a) of this section shall pay a fee based on its annual tonnage of generated hazardous waste. Any unexpended balance of such collected fees shall not be transferred to the general revenue fund, but shall remain in the fund. The director shall vary the fees annually to a level necessary to produce a fund of at least one million dollars at the beginning of each calendar year, but in no event shall the fees established be set to produce revenue exceeding five hundred thousand dollars in any year. When the fund's unobligated balance exceeds one million five hundred thousand dollars at the end of the calendar year, generator assessments under this article shall cease until such time as the fund's unobligated balance at the end of any year is less than one million dollars.

(c) Generator fee assessments are due and payable to the division of environmental protection on the fifteenth day of January of each year. Such payments shall be accompanied by information in such form as the director may prescribe.

(d) If the fees or any portion thereof are not paid by the date prescribed, interest accrues upon the unpaid amount at the rate of ten percent per annum from the date due until payment is actually made. Such interest payments shall be deposited in the fund. If any generator fails to pay the fees imposed before April one of the year in which the are due, there is imposed in addition to the fee and interest determined to be owed a surcharge equivalent to the total amount of the fee which shall also be collected and deposited in the fund. (1994, c. 61.)

§ 22-19-5. Director's responsibilities; fee schedules; authorized expenditures; other powers of director; authorizing civil actions; assistance of attorney general or prosecuting attorney.

(a) The director shall collect all fees assessed pursuant to this article and administer the fund. The fee schedule shall be published in the state register by the first day of August of each year. Each generator who filed the fee [illegible] director shall be notified and provided with a copy of the fee schedule by certified mail. In the event the fee schedule is not published by the first day of August, the date prescribed for payment in section four [§ 22-19-4] of this article shall be advanced by the same number of days that the publication of the fee schedule is delayed. The interest and surcharge provisions of section four of this article shall be similarly advanced.

(b) The director is authorized to enter into agreements and contracts and to expend the moneys in the fund for the following purposes:

(1) Responding to hazardous waste emergencies when, based on readily available information, the director determines that immediate action may prevent or mitigate significant risk of harm to human health, safety or the environment from hazardous wastes in situations for which no federal funds are immediately available for such response cleanup or containment: Provided, That the director shall apply for and diligently pursue available federal funds for such emergencies at the earliest possible time: Provided, however, That funds shall not be expended under this subsection to cleanup or contain off-site releases of hazardous waste which are classified as such only as a result of such releases;

(2) Reimbursing any person for reasonable cleanup costs incurred with the authorization of the director in responding to a hazardous waste emergency pursuant to authorization of the director;

(3) Financing the nonfederal share of the cleanup and site reclamation activities pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as well as future operation and maintenance costs for these sites; and

(4) Financing any and all preparations necessary for responding to hazardous waste activities and emergencies within the state, including, but not limited to, the purchase or lease of hazardous waste emergency response equipment: Provided, That after the fifteenth of January, one thousand nine hundred eighty-seven, no funds shall be expended under this subdivision unless the fund is greater than one million dollars and any expenditure will not reduce the fund below one million dollars.

(c) Prior to making expenditures from the fund pursuant to subdivision (1), (2) or (3), subsection (b) of this section, the director will make reasonable efforts to secure agreements to pay the costs of cleanup and remedial actions from owners or operators of sites or other responsible persons.

(d) The director is authorized to promulgate and revise rules in compliance with chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code to implement and effectuate the powers, duties and responsibilities vested in him or her under this article. Prior to the assessment of any fees under this article, the director shall promulgate rules which account for the mixture of hazardous and nonhazardous constituents in the hazardous waste which is generated. The director shall not assess a fee on the nonhazardous portion, including, but not limited to, the weight of water.

(e) The director is authorized to recover through civil action or cooperative agreements with responsible persons the full amount of any funds expended for purposes enumerated in subdivision (1), (2) or (3), subsection (b) of this section. All moneys expended from the fund which are so recovered shall be

deposited in the fund. Any civil action instituted pursuant to this subsection may be brought in either Kanawha County or the county in which the hazardous waste emergency occurs or the county in which remedial action is taken.

(f) The director is authorized to institute a civil action against any generator for failure to pay any fee assessed pursuant to this article. Any action instituted against a generator pursuant to this subsection may be brought in either Kanawha County or the county in which the generator does business. The generator shall pay all attorney fees and costs of such action if the director prevails.

(g) Upon request by the director, the attorney general or prosecuting attorney for the county in which an action was brought shall assist the director in any civil action instituted pursuant to this section and any proceedings relating thereto.

(h) The director is authorized to enter into contracts or cooperative agreements with the federal government to secure to the state the benefits of funding for action taken pursuant to the requirements of the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980.

(i) The director is authorized to accept gifts, donations, contributions, bequests or devises of money, security or property for deposit in the fund.

(j) The director is authorized to invest the fund to earn a reasonable rate of return on the unexpended balance. (1994, c. 61.)

Editor's notes. — The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, referred to above, is codified as 42 U.S.C. § 6911a.

§ 22-19-6. State hazardous waste contingency plan.

The director shall promulgate rules in compliance with chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code, establishing a state hazardous waste contingency plan which shall set forth procedures and standards for responding to hazardous waste emergencies, for conducting remedial cleanup and maintenance of hazardous waste sites and for making expenditures from the fund after the date of promulgation of the plan. The plan shall include:

(a) Methods for discovering, reporting and investigating sites at which hazardous waste may present significant risk of harm to the public health and safety or to the environment;

(b) Methods and criteria for establishing priority responses and for determining the appropriate extent of cleanup, containment and other measures authorized by this article;

(c) Appropriate roles for governmental, interstate and nongovernmental entities in effectuating the plan;

(d) Methods for identifying, procuring, maintaining, and storing hazardous waste response equipment and supplies; and

(e) M[illegible] to identify the most appropriate and cost-effective emergency and rem[illegible]ctions in view of the relative risk or danger presented by each case or eve[illegible]. (1994, c. 61.)

ARTICLE 20.

ENVIRONMENTAL ADVOCATE.

Sec.
22-20-1. Appointment of environmental advocate; powers and duties; salary; continuation of position.

§ 22-20-1. Appointment of environmental advocate; powers and duties; salary; continuation of position.

The director of the division of environmental protection shall appoint a person to serve as the environmental advocate within the division of environmental protection, and shall adopt and promulgate rules in accordance with the provisions of article three [§ 29A-3-1 et seq.], chapter twenty-nine-a of this code governing and controlling the qualifications, powers and duties of the person to be appointed to the position of environmental advocate. The environmental advocate shall serve at the will and pleasure of the director, who shall also set the salary of the environmental advocate. All funding for the office of environmental advocate shall be from existing funds of the division of environmental protection. The director shall provide an office and secretarial and support staff as needed. The position of environmental advocate shall continue to exist until the first day of July, one thousand nine hundred ninety-seven, to allow for the completion of a preliminary performance review pursuant to article ten [§ 4-10-1 et seq.], chapter four of this code. (1994, c. 61.)

ARTICLE 21.

COALBED METHANE WELLS AND UNITS.

Sec.
22-21-1. Declaration of public policy; legislative findings.
22-21-2. Definitions.
22-21-3. Application of article; exclusions; application of chapter twenty-two-b to coalbed methane wells.
22-21-4. Chief; powers and duties generally.
22-21-5. Duties of the coalbed methane review board; meetings; notice, powers and duties generally.
22-21-6. Permit required for coalbed methane well; permit fee; application; soil erosion control plan; penalties.
22-21-7. Consent and agreement of coal owner or operator.
22-21-8. Performance bonds; corporate surety or other security.
22-21-9. Notice to owners.
22-21-10. Procedure for filing comments.
22-21-11. Objections or comments to coalbed methane wells by coal owner or operator; hearings.
22-21-12. Review of application; issuance of permit in the absence of objections; copy of permits to county assessor.
22-21-13. Review board hearing; findings; order.
22-21-14. Protective devices required when a coalbed methane well penetrates workable coal bed; when a coalbed methane well is drilled through horizon of coal bed from which coal has been removed; notice of stimulation; results of stimulation.
22-21-15. Drilling units and pooling of interests.
22-21-16. Notice to owners.
22-21-17. Review of applicati[illegible] pooling order; spacing, [illegible]erator;

CHAPTER 22B.
ENVIRONMENTAL BOARDS.

Editor's notes. — Acts 1994, c. 61 amended and reenacted this chapter, substituting present articles one through four for former articles one through five. For a summary of the span, history and subject matter of the former articles see the editor's notes following each article heading. Former article 5, §§ 22B-5-1 to 22B-5-12 (enacted by Acts 1992, c. 3), concerning the West Virginia Abandoned Well Act was repealed by the amendment and reenactment of this chapter.

ARTICLE 1.
GENERAL POLICY AND PURPOSE.

Editor's notes. — Acts 1994, c. 61 amended and reenacted this article, substituting present §§ 22B-1-1 to 22B-1-12 for former §§ 22B-1-1 to 22B-1-41 (enacted by Acts 1985, c. 77 and amended by Acts 1986, c. 103; 1987, c. 97; 1988, c. 67; and 1992, c. 71), concerning the division of oil and gas, and administration and enforcement. Although similar in many respects to former §§ 22B-1-1 to 22B-1-41, the new provisions are sufficiently different that a detailed explanation of the changes and the retention of historical citations from the former laws were impracticable.

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§ 22B-1-1. Declaration of policy and purpose.

It is hereby declared to be the policy of this state and the purpose of this chapter to provide fair, efficient and equitable treatment of appeals of environmental enforcement and permit actions to the boards set forth herein.

It is also the intent of the Legislature to consolidate and combine the legal, technical and support personnel of the three boards, to provide for consistent [illegible] and to maintain continuity of the boards' functions and

membership. The boards shall share physical facilities, hearing rooms, technical and support staff and general overhead. In addition, it is the policy of this state to retain and maintain adequate funding and sufficient support personnel to ensure knowledgeable and informed decisions.

It is the policy of this state that administrative hearings and appeals be conducted in a quasi-judicial manner providing for discovery and case management. The appellate functions of the several environmental boards should be accomplished with similar procedural rules designed to assure expeditious and equitable hearings and decisions. Further, there shall be a central depository for appellate information and the filing of appeals. It is also the policy of this state that the rule-making authority set forth in this chapter be implemented in an efficient manner consistent with the public policy of this state.

Furthermore, it is the intent of the Legislature that all actions taken pursuant to this chapter assure implementation of the policies set forth in this chapter and chapter twenty-two [§ 22-1-1 et seq.] of this code. (1994, c. 61.)

§ 22B-1-2. Definitions.

Unless the context clearly requires a different meaning, as used in this chapter the following terms have the meanings ascribed to them:

(1) "Board" or "boards" means the applicable board continued pursuant to the provisions of this chapter, including the air quality board, the environmental quality board and the surface mine board;

(2) "Chief" means the chief of the office of water resources or the chief of the office of waste management or the chief of the office of air quality or the chief of the office of oil and gas or the chief of the office of mining and reclamation or any other person who has been delegated authority by the director, all of the division of environmental protection, as the case may be;

(3) "Director" means the director of the division of environmental protection or the director's designated representative;

(4) "Division" means the division of environmental protection of the department of commerce, labor and environmental resources;

(5) "Member" means an individual appointed to one of the boards or the ex officio members of the air quality board; and

(6) "Person" or "persons" means any public or private corporation, institution, association, firm or company organized or existing under the laws of this or any other state or country; the state of West Virginia; governmental agency; political subdivision; county commission; municipal corporation; industry; 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. (1994, c. 61.)

§ 22B-1-3. General administration.

(a) The chairs of the boards shall exercise the following powers, authorities and duties:

(1) To provide for the management of facilities and personnel of the boards;

(2) To employ, terminate and compensate support staff for the boards and to fix the compensation of that staff, which shall be paid out of the state treasury, upon the requisition of moneys appropriated for such purposes, or from joint funds as the chairs may expend;

(3) To the extent permitted by and consistent with federal or state law, to consolidate, combine or contribute funds of the boards to maintain the central physical facilities and technical and support personnel;

(4) To the extent permitted by and consistent with federal or state law, to consolidate or combine any functions of the boards;

(5) To secure funding with the assistance of the chairs from whatever source permissible by law;

(6) To secure office space, purchase materials and supplies, and enter into contracts necessary, incident or convenient to the accomplishment of the purposes of this chapter;

(7) To expend funds in the name of any of the boards;

(8) To consult with the secretary of the department of commerce, labor and environmental resources, or the successor agency or office, or the director of the division of environmental protection who shall cooperate with the chairs in order to effectuate the powers, authorities and duties set forth in this section;

(9) To hire individuals, as may be necessary, to serve as hearing examiners for the boards; and

(10) To provide for an individual to serve as the clerk to the boards.

(b) The clerk to the boards has the following duties, to be exercised in consultation with the chairs:

(1) To schedule meetings and hearings and enter all orders properly acted upon;

(2) To receive and send all papers, proceedings, notices, motions and filings;

(3) To the maximum extent practicable, and with the cooperation of the staff and hearing examiners, to assist the boards in the case management of appeals and proceedings;

(4) To maintain records of all proceedings of the boards which shall be entered in a permanent record, properly indexed, and the same shall be carefully preserved for each board. Copies of orders entered by the boards, as well as copies of papers or documents filed with it, shall be maintained in a central location;

(5) To direct and fulfill information requests subject to chapter twenty-nine-b [§ 29B-1-1 et seq.] of this code and subject to applicable confidentiality rules set forth in the statutes and rules; and

(6) To perform such other duty or function as may be directed by the chairs to carry out the purpose of this chapter.

(c) The boards shall establish procedural rules in accordance with the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code for the regulation of the conduct of all proceedings before the boards. To the maximum extent practicable, the procedural rules will be identical for each board. The procedural rules of the boards shall be contained in a single set of rules for filing with the secretary of state. (1994, c. 61.)

§ 22B-1-4. General provisions applicable to all boards and board members.

(a) Each member of a board, other than an ex officio member, shall be paid as compensation for work performed as a member, from funds appropriated for such purposes, one hundred dollars per day when actually engaged in the performance of work as a board member. In addition to such compensation, each member of the board shall be reimbursed for all reasonable and necessary expenses actually incurred in the performance of the board member's duties.

(b) At its first meeting in each fiscal year each board shall elect from its membership a chair and vice chair to act during such fiscal year. The chair shall preside over the meetings and hearings of the board. The vice chair shall assume the chair's duties in the absence of the chair. All of the meetings shall be general meetings for the consideration of any and all matters which may properly come before the board.

(c) For the environmental quality board and the air quality board, a majority of each board is a quorum for the transaction of business and an affirmative vote of a majority of the board members present is required for any motion to carry or decision of the board to be effective. For the surface mine board four members is a quorum and no action of the board is valid unless it has the concurrence of at least four members. For all boards, in the event of a tie vote on the ultimate decision which is the subject of an appeal before the board, the decision of the chief or the director, as the case may be, shall be affirmed. Each board shall meet at such times and places as it may determine and shall meet on call of its chair. It is the duty of the chair to call a meeting of the board within thirty days on the written request of three members thereof.

(d) In all cases where the filing of documents, papers, motions and notices with the board is required or a condition precedent to board action, filing with the clerk constitutes filing with the board. (1994, c. 61.)

§ 22B-1-5. General powers and duties of boards.

In addition to all other powers and duties of the air quality board, environmental quality board and surface mine board as prescribed in this chapter or elsewhere by law, the boards created or continued pursuant to the provisions of this chapter have and may exercise the following powers and authority and shall perform the following duties:

(1) To consider appeals, subpoena witnesses, administer oaths, make investigations and hold hearings relevant to matters properly pending before a board;

(2) On any matter properly pending before it whenever the parties achieve agreement that a person will cease and desist in any act resulting in the discharge or emission of pollutants or do any act to reduce or eliminate such discharge or emission, or do any act to achieve compliance with this chapter or chapter twenty-two [§ 22-1-1 et seq.] or rules promulgated thereunder or do any act to resolve an issue pending before a board, such agreement, upon approval of the board, shall be embodied in an order and entered as, and has the same effect as, an order entered after a hearing as provided in section seven [§ 22B-1-7] of this article;

(3) To enter and inspect any property, premise or place on or at which a source or activity is located or is being constructed, installed or established at any reasonable time for the purpose of ascertaining the state of compliance with this chapter or chapter twenty-two and the rules promulgated thereunder: Provided, That nothing contained in this section eliminates any obligation to follow any process that may be required by law; and

(4) To perform any and all acts within the appropriate jurisdiction of each board to secure for the benefit of the state participation in appropriate federally delegated programs. (1994, c. 61.)

§ 22B-1-6. General procedural provisions applicable to all boards.

(a) Any appeal hearing brought pursuant to this chapter shall be conducted by a quorum of the board, but the parties may by stipulation agree to take evidence before any one or more members of the board or a hearing examiner employed by the board. For the purpose of conducting such appeal hearing, any member of a board and the clerk has the power and authority to issue subpoenas and subpoenas duces tecum in the name of the board, in accordance with the provisions of section one [§ 29A-5-1], article five, chapter twenty-nine-a 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 provisions of said section one dealing with subpoenas and subpoenas duces tecum apply to subpoenas and subpoenas duces tecum issued for the purpose of an appeal hearing hereunder.

(b) In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person, or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the disobedience, neglect or refusal occurs, on application of the board or any member thereof, shall compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena or subpoena duces tecum issued from the court of a refusal to testify therein.

(c) In accordance with the provisions of section one, article five of said chapter twenty-nine-a, all of the testimony at any hearing held by a board shall be recorded by stenographic notes and characters or by mechanical or electronic means. If requested by any party to an appeal, the hearing and any testimony offered shall be transcribed in which event the cost of transcribing shall be paid by the party requesting the transcript. The record shall include all of the testimony and other evidence and the rulings on the admissibility of evidence, but any party may at the time object to the admission of any evidence and except to the rulings of the board thereon, and if the board refuses to admit evidence the party offering the same may make a proffer thereof, and the proffer shall be made a part of the record of the hearing.

(d) All of the pertinent provisions of article five [§ 29A-5-1 et seq.], chapter twenty-nine-a of this code, apply to and govern the hearing on appeal authorized by the provisions of 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, except as specifically provided herein. (1994, c. 61.)

§ 22B-1-7. Appeals to boards.

(a) The provisions of this section are applicable to all appeals to the boards, with the modifications or exceptions set forth in this section.

(b) Any person authorized by statute to seek review of an order, permit or official action of the chief of air quality, the chief of water resources, the chief of waste management, the chief of mining and reclamation, the chief of oil and gas, or the director may appeal to the air quality board, the environmental quality board or the surface mine board, as appropriate, in accordance with this section. The person so appealing shall be known as the appellant and the appropriate chief or the director shall be known as the appellee.

(c) An appeal filed with a board by a person subject to an order, permit or official action shall be perfected by filing a notice of appeal with the board within thirty days after the date upon which such order, permit or official action was received by such person as demonstrated by the date of receipt of registered or certified mail or of personal service. For parties entitled to appeal other than the person subject to such order, permit or official action, an appeal shall be perfected by filing a notice of appeal with the board within thirty days after the date upon which service was complete. For purposes of this subsection, service is complete upon tendering a copy to the designated agent or to the individual who, based upon reasonable inquiry, appears to be in charge of the facility or activity involved, or to the permittee; or by tendering a copy by registered or certified mail, return receipt requested to the last known address of the person on record with the agency. Service is not incomplete by refusal to accept. Notice of appeal must be filed in a form prescribed by the rule of the board for such purpose. Persons entitled to appeal may also file a notice of appeal related to the failure or refusal of the appropriate chief or the director to act within a specified time on an application for a permit; such notice of appeal shall be filed within a reasonable time.

(d) The filing of the notice of appeal does not stay or suspend the effectiveness or execution of the order, permit or official action appealed from, except that the filing of a notice of appeal regarding a notice of intent to suspend, modify or revoke and reissue a permit, issued pursuant to the provisions of section five [§ 22-5-5], article five, chapter twenty-two of this code, does stay the notice of intent from the date of issuance pending a final decision of the board. If it appears to the appropriate chief, the director or the board that an unjust hardship to the appellant will result from the execution or implementation of a or director's order, permit or official action pending determination of th eal, the appropriate chief, the director or the board, as the case may be, may grant a stay or suspension of such order, permit or official

action and fix its terms. A decision shall be made on any request for a stay within five days of the date of receipt of the request for stay. The notice of appeal shall set forth the terms and conditions of the order, permit or official action 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 appropriate chief or director within seven days after the notice of appeal is filed with the board.

(e) Within fourteen days after receipt of a copy of the notice of appeal, the appropriate chief or the director as the case may be, 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 applicable files relating to the matter in question. With the consent of the board and upon such terms and conditions as the board may prescribe, any person affected by the matter pending before the board may by petition intervene as a party appellant or appellee. In any appeal brought by a third party, the permittee or regulated entity shall be granted intervenor status as a matter of right where issuance of a permit or permit status is the subject of the appeal. The board shall hear the appeal de novo, and evidence may be offered on behalf of the appellant, appellee and by any intervenors. The board may visit the site of the activity or proposed activity which is the subject of the hearing and take such additional evidence as it considers necessary: Provided, That all parties and intervenors are given notice of the visit and are given an opportunity to accompany the board. The appeal hearing shall be held at such location as may be approved by the board including Kanawha County, the county wherein the source, activity or facility involved is located or such other location as may be agreed to among the parties.

(f) Any such hearing shall be held within thirty 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 or the director, as appropriate, may be represented by counsel. If so represented they shall be represented by the attorney general or with the prior written approval of the attorney general may employ counsel who shall be a special assistant attorney general. At any such hearing the appellant and any intervenor may represent themselves or be represented by an attorney-at-law admitted to practice before the supreme court of appeals.

(g) After such hearing and consideration of all the testimony, evidence and record in the case:

(1) The environmental quality board or the air quality board, as the case may be, shall make and enter a written order affirming, modifying or vacating the order, permit or official action of the chief or director, or shall make and enter such order as the chief or director should have entered, or shall make and enter an order approving or modifying the terms and conditions of any permit issued; and

(2) The surface mine board shall make and enter a written order affirming the decision appealed from if the board finds that the d s lawful and reasonable, or if the board finds that the decision w pported by

substantial evidence in the record considered as a whole, it shall make and enter a written order reversing or modifying the decision of the director.

(h) In appeals of an order, permit or official action taken pursuant to articles three, six, eleven, twelve, thirteen, fifteen [§§ 22-3-1 et seq., 22-6-1 et seq., 22-11-1 et seq., 22-12-1 et seq., 22-13-1 et seq., 22-15-1 et seq.], chapter twenty-two of this code, the environmental quality board established in article three of this chapter, shall take into consideration, in determining its course of action in accordance with subsection (g) of this section, not only the factors which the appropriate chief or the director was authorized to consider in issuing an order, in granting or denying a permit, in fixing the terms and conditions of any permit, or in taking other official action, but also the economic feasibility of treating or controlling, or both; the discharge of solid waste, sewage, industrial wastes or other wastes involved.

(i) An order of a board 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.

(j) 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 this chapter. The order of the board shall be final unless vacated or modified upon judicial review thereof in accordance with the provisions of this chapter. (1994, c. 61.)

§ 22B-1-8. General provisions governing discovery.

(a) Parties to a hearing may petition a board to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending hearing, subject to the procedural rules of the boards and the limitations contained herein.

(b) The following limited discovery may be commenced and obtained by any party to the hearing without leave of a board:

(1) Requests for disclosure of the identity of each person expected to be called as a witness at the hearing and, at a minimum, a statement setting forth with specificity the facts alleged, the anticipated testimony and the identity of any documents relied upon in support of the anticipated testimony of each witness and whether that witness will be called as an expert; and

(2) Requests to identify with reasonable particularity the issues which are the subject of the hearing.

(c) Any party may object to a request or manner of discovery authorized by this section provided the objection sets forth with particularity the grounds for the objection. A party may move the board to rule on the propriety of the discovery or objection and request the board to enter an order as the board deems appropriate.

(d) Any party may seek, by motion, a protective order from the discovery sought by another party and, if required, the board may protect a party from

unwarranted discovery. Upon motion of a party or upon a board's own motion, the board may enter such protective order limiting discovery, which order shall not be inconsistent with the standards for protective orders set forth in the West Virginia rules of civil procedure.

(e) Upon motion of a party or upon a board's own motion, the board may authorize or order any additional discovery as may be appropriate or necessary to identify or refine the issues which are the subject of the hearing. Upon agreement of the parties, or upon order of a board, the board may authorize or order the taking of the deposition of any witness with information or knowledge relevant to the subject matter of the hearing which deposition may be noticed by subpoena or subpoena duces tecum.

(f) Upon motion of a party or upon a board's own motion, a board may hold a prehearing conference, as soon as practicable after the commencement of an appeal, which conference shall be for purposes of promoting a fair, efficient and expeditious hearing process. Following the conference, the board may enter an order or take such other action as may be appropriate with respect to discovery issues.

(g) For purposes of this section, in all cases where the board is authorized or empowered to issue orders, a member of the board, with the concurrence of a majority of the board, may act on behalf of the board, the board may act itself or through its clerk or hearing examiner, as such person is authorized to do so by the board.

(h) Every request for discovery or response or objection thereto made by a party shall be signed in the same manner as is provided for in Rule 26 of the West Virginia rules of civil procedure. (1994, c. 61.)

§ 22B-1-9. General provisions for judicial review.

(a) Any person or a chief or the director, as the case may be, adversely affected by an order made and entered by a board after an appeal hearing, held in accordance with the provisions of this chapter, is entitled to judicial review thereof. All of the provisions of section four [§ 29A-5-4], article five, chapter twenty-nine-a of this code apply to and govern the review with like effect as if the provisions of said section four were set forth in extenso in this section, with the modifications or exceptions set forth in this chapter.

(b) The judgment of the circuit court is 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 shall be filed with said supreme court of appeals within ninety days from the date of entry of the judgment of the circuit court.

(c) Legal counsel and services for a chief or the director 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 or her assistants or by the prosecuting attorney of the county in which the appeal is taken, all without additional compensation, or with the prior written approval of the attorney general, a chief or the director may employ legal counsel. (1994, c. 61.)

§ 22B-1-10. Confidentiality.

With respect to any information obtained in the course of an appeal, all members of boards and all personnel employed thereby shall maintain confidentiality to the same extent required of the chief or director. (1994, c. 61.)

§ 22B-1-11. Conflict of interest.

In addition to the specific conflict of interest provisions set forth in this chapter, any member who has any financial interest in the outcome of a decision of the board shall not vote or act on any matter which shall directly affect the member's personal interests. (1994, c. 61.)

§ 22B-1-12. Savings provisions.

(a) All orders, determinations, rules, permits, grants, contracts, certificates, licenses, waivers, bonds, authorizations and privileges which have been issued, made, granted or allowed to become effective by a board in the performance of functions which are affected by the enactment of this chapter, and which are in effect on the date this chapter becomes effective, shall continue in effect according to their terms until modified, terminated, superseded, set aside or revoked in accordance with the law.

(b) The provisions of this chapter do not affect any appeals, proceedings, including notices of proposed rule making, or any application for any license, permit, certificate or financial assistance pending on the effective date of this chapter, before any of the boards. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this chapter had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded or revoked by the board within which jurisdiction to do so is vested, by a court of competent jurisdiction or by operation of law. Nothing in this subsection prohibits the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that the proceeding could have been discontinued or modified if this chapter had not been enacted.

(c) Orders and actions of a board in the exercise of functions amended by under this chapter are subject to judicial review to the same extent and in the same manner as if such orders and actions had been by a board exercising such functions immediately preceding the enactment of this chapter. (1994, c. 61.)

Editor's notes. — Concerning the reference in (a) to "the date this chapter becomes effective," Acts 1994, c. 61, which amended and reenacted this chapter, passed March 12, 1994 and became effective 90 days from passage.

ARTICLE 2.

AIR QUALITY BOARD.

Editor's notes. — Acts 1994, c. 61 amended and reenacted this article, substituting present §§ 22B-2-1 to 22B-2-3 for former §§ 22B-2-1 to 22B-2-9 (enacted by Acts 1985, c. 77), concerning oil and gas production damage compensation. Although similar in many respects to former §§ 22B-2-1 to 22B-2-9, the new provisions are sufficiently different that a detailed explanation of the changes and the retention of historical citations from the former laws were impracticable.

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§ 22B-2-1. Air quality board; composition; appointment and terms of members; vacancies.

(a) On and after the effective date of this article, the "air pollution control commission," heretofore created, shall continue in existence and hereafter shall be known as the "air quality board."

(b) The board shall be composed of seven members, including the commissioner of the bureau of public health and the commissioner of agriculture, or their designees, both of whom are members ex officio, and five other members, who shall be appointed by the governor with the advice and consent of the Senate. Each appointed member of the board who is serving in such capacity on the effective date of this article shall continue to serve on the board until his or her term ends or he or she resigns or is otherwise unable to serve. As each such member's term ends, or that member is unable to serve, a qualified successor shall be appointed by the governor with the advice and consent of the Senate. Two of the members shall be representative of industries engaged in business in this state, and three of the members shall be representative of the public at large.

(c) The appointed members of the board shall be appointed for overlapping terms of five years, except that the original appointments shall be for terms of one, two, three, four and five years, respectively. Any member whose term expires may be reappointed by the governor. In the event a board member is unable to complete the term, the governor shall appoint a person with similar qualification to complete the term. The successor of any board member appointed pursuant to this article must possess the qualification as prescribed herein. Each vacancy occurring in the office of a member of the board shall be filled by appointment within sixty days after such vacancy occurs. (1994, c. 61.)

Editor's notes. — Concerning the reference in (a) to "the effective date of this article," Acts 1994, c. 61, which amended and reenacted this article, passed March 12, became effective 90 days from pas

§ 22B-2-2. Authority to receive money.

In addition to all other powers and duties of the air quality board, as prescribed in this chapter or elsewhere by law, the board has and may exercise the power and authority to receive any money as a result of the resolution of any case on appeal which shall be deposited in the state treasury to the credit of the office of air pollution education and environment fund provided for in section four [§ 22-5-4], article five, chapter twenty-two of this code. (1994, c. 61.)

§ 22B-2-3. Judicial review of air quality board orders.

All of the provisions of section nine, article one of this chapter apply to and govern such review with like effect as if the provisions of said section nine 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 for review shall be filed in the circuit court of Kanawha County; and

(2) As to all other cases, the petition shall be filed, in the circuit court of the county wherein the alleged statutory air pollution complained of originated or in Kanawha County upon agreement between the parties. (1994, c. 61.)

ARTICLE 3.

ENVIRONMENTAL QUALITY BOARD.

Editor's notes. — Acts 1994, c. 61 amended and reenacted this article, substituting present §§ 22B-3-1 to 22B-3-4 for former §§ 22B-3-1 to 22B-3-13 (enacted by Acts 1985, c. 77 and amended by Acts 1994, c. 158), concerning transportation of oils. Although similar in many respects to former §§ 22B-3-1 to 22B-3-13, the new provisions are sufficiently different that a detailed explanation of the changes and the retention of historical citations from the former laws were impracticable.

Section 22B-3-5, which appears at the end of this article, was amended and reenacted by Acts 1994, c. 158.

§ 22B-3-1. Environmental quality board; composition and organization; appointment, qualifications, terms, vacancies.

(a) On and after the effective date of this article, the "water resources board," heretofore created, shall continue in existence and hereafter shall be known as the "environmental quality board."

(b) The board shall be composed of five members who shall be appointed by the governor with the advice and consent of the Senate. Not more than three members of the board shall be of the same political party. Each appointed member of the board who is serving in such capacity on the effective date of this article shall continue to serve on the board until his or her term ends or he or she resigns or is otherwise unable to serve. As each member's term ends, or that member is unable to serve, a qualified successor shall be appointed by the governor with the advice and consent of the Senate. Individuals appointed to the board shall be persons who by reason of previous training and experience are knowledgeable in the husbandry of the state's water resources and with at least one member with experience in industrial pollution control.

(c) No member of the board shall receive or, during the two years next preceding the member of the board's appointment, shall have received a significant portion of the member of the board's income directly or indirectly from a national pollutant discharge elimination system permit holder or an applicant for a permit issued under any of the provisions of article eleven [§ 22-11-1 et seq.], chapter twenty-two of this code. For the purposes of this subsection: (1) The term "significant portion of the member of the board's income" means ten percent of gross personal income for a calendar year, except that it means fifty percent of gross personal income for a calendar year if the recipient is over sixty years of age and is receiving such portion pursuant to retirement, a pension or similar arrangement; (2) the term "income" includes retirement benefits, consultant fees and stock dividends; (3) income is not received "directly or indirectly" from "permit holders" or "applicants for a permit" where it is derived from mutual-fund payments or from other diversified investments with respect to which the recipient does not know the identity of the primary sources of income; and (4) the terms "permit holders" and "applicants for a permit" do not include any university or college operated by this state or political subdivision of this state.

(d) The members of the board shall be appointed for overlapping terms of five years, except that the original appointments shall be for terms of one, two, three, four and five years, respectively. Any member whose term expires may be reappointed by the governor. In the event a board member is unable to complete the term, the governor shall appoint a person with similar qualification to complete the term. The successor of any board member appointed pursuant to this article must possess the qualification as prescribed herein. Each vacancy occurring in the office of a member of the board shall be filled by appointment within sixty days after such vacancy occurs. (1994, c. 61.)

Editor's notes. — Concerning the references in (a) and (b) to "the effective date of this article," Acts 1994, c. 61, which amended and reenacted this article, passed March 12, 1994 and became effective 90 days from passage.

§ 22B-3-2. Authority of board; additional definitions.

(a) In addition to all other powers and duties of the environmental quality board, as prescribed in this chapter or elsewhere by law, the board has and may exercise the powers and authorities:

(1) To receive any money as a result of the resolution of any case on appeal which shall be deposited in the state treasury to the credit of the water quality management fund created pursuant to section ten [§ 22-11-10], article eleven, chapter twenty-two of this code;

(2) To advise, consult and cooperate with other agencies of the state, political subdivisions of the state, other states, agencies of the federal government, industries and with affected groups and take such other action as may be appropriate in regard to its rule-making authority; and

(3) To encourage and conduct such studies and research relating to pollution control and abatement as a board may deem advisable and necessary in regard to its rule-making authority.

(b) All the terms defined in section two [§ 22-11-2], article eleven, chapter twenty-two of this code, are applicable to this article and have the meanings ascribed to them therein. (1994, c. 61.)

§ 22B-3-3. Judicial review.

All of the provisions of section nine [§ 22B-1-9], article one of this chapter apply to and govern such review with like effect as if the provisions of said section nine 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 in the circuit court of Kanawha County;

(2) As to cases involving an order revoking or suspending a permit, the petition shall be filed in the circuit court of Kanawha County; and

(3) As to cases involving an order directing that any and all discharges or deposits of solid waste, sewage, industrial wastes or other wastes, or the effluent therefrom, determined to be causing pollution be stopped or prevented or else that remedial action be taken, the petition shall be filed in the circuit court of the county in which the establishment is located or in which the pollution occurs. (1994, c. 61.)

§ 22B-3-4. Environmental quality board rule-making authority.

(a) In order to carry out the purposes of this chapter and chapter twenty-two [§ 22-1-1 et seq.] of this code, the board shall promulgate legislative rules setting standards of water quality applicable to both the surface waters and groundwaters of this state. Standards of quality with respect to surface waters shall be such as to protect the public health and welfare, wildlife, fish and aquatic life, and the present and prospective future uses of such waters for domestic, agricultural, industrial, recreational, scenic and other legitimate beneficial uses thereof.

(b) No rule of the board may specify the design of equipment, type of construction or particular method which a person shall use to reduce the discharge of a pollutant.

(c) The board shall promulgate such legislative rules in accordance with the provisions of article three [§ 29A-3-1 et seq.], chapter twenty-nine-a of this code and the declaration of policy set forth in section two [§ 22-11-2], article eleven, chapter twenty-two of this code. (1994, c. 61.)

§ 22B-3-5. Environmental quality board continued.

Pursuant to the provisions of article ten [§ 4-10-1 et seq.], chapter four of this code, and following a preliminary performance review by the joint committee on government operations, the environmental quality board shall continue to exist until the first day of July, two thousand. (1994, c. 158.)

Editor's notes. — Acts 1994, c. 61 amended and reenacted this article, substituting present §§ 22B-3-1 to 22B-3-4 for former §§ 22B-3-1 to 22B-3-13. This section appears as amended and reenacted by Acts 1994, c. 158.

Effective dates. — Acts 1994, c. 158, provided that the act take effect July 1, 1994.

ARTICLE 4.

SURFACE MINE BOARD.

Editor's notes. — Acts 1994, c. 61 amended and reenacted this article, substituting present §§ 22B-4-1 to 22B-4-3 for former §§ 22B-4-1 to 22B-4-13 (enacted by Acts 1985, c. 77), concerning underground gas storage reservoirs. Although similar in many respects to former §§ 22B-4-1 to 22B-4-13, the new provisions are sufficiently different that a detailed explanation of the changes and the retention of historical citations from the former laws were impracticable.

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§ 22B-4-1. Appointment and organization of surface mine board.

(a) On and after the effective date of this article, the "reclamation board of review," heretofore created, shall continue in existence and hereafter shall be known as the "surface mine board."

(b) The board shall be composed of seven members who shall be appointed by the governor with the advice and consent of the Senate. Not more than four

members of the board shall be of the same political party. Each appointed member of the board who is serving in such capacity on the effective date of this article shall continue to serve on the board until his or her term ends or he or she resigns or is otherwise unable to serve. As each member's term ends, or that member is unable to serve, a qualified successor shall be appointed by the governor with the advice and consent of the Senate. One of the appointees to such board shall be a person who, by reason of previous vocation, employment or affiliations, can be classed as one capable and experienced in coal mining. One of the appointees to such board shall be a person who, by reason of training and experience, can be classed as one capable and experienced in the practice of agriculture. One of the appointees to such board shall be a person who by reason of training and experience, can be classed as one capable and experienced in modern forestry practices. One of the appointees to such board shall be a person who, by reason of training and experience, can be classed as one capable and experienced in engineering. One of the appointees to such board shall be a person who, by reason of training and experience, can be classed as one capable and experienced in water pollution control or water conservation problems. One of the appointees to such board shall be a person with significant experience in the advocacy of environmental protection. One of the appointees to such board shall be a person who represents the general public interest.

(c) During his or her tenure on the board, no member shall receive significant direct or indirect financial compensation from or exercise any control over any person or entity which holds or has held, within the two years next preceding the member's appointment, a permit to conduct activity regulated by the division, under the provisions of article three or four [§ 22-3-1 et seq. or § 22-4-1 et seq.], chapter twenty-two of this code, or any similar agency of any other state or of the federal government: Provided, That the member classed as experienced in coal mining, the member classed as experienced in engineering, and the member classed as experienced in water pollution control or water conservation problems may receive significant financial compensation from regulated entities for professional services or regular employment so long as the professional or employment relationship is disclosed to the board. No member shall participate in any matter before the board related to a regulated entity from which the member receives or has received, within the preceding two years direct or indirect financial compensation. For purposes of this section, "significant direct or indirect financial compensation" means twenty percent of gross income for a calendar year received by the member, any member of his or her immediate family or the member's primary employer.

(d) The members of the board shall be appointed for terms of the same duration as their predecessor under the original appointment of two members appointed to serve a term of two years; two members appointed to serve a term of three years; two members to serve a term of four years; and one member to serve a term of five years. Any member whose term expires may be reappointed by the governor. In the event a board member is unable to complete the term, the governor shall appoint a person with similar qualification to complete the term. The successor of any board member appointed pursuant to this article must possess the qualification as prescribed herein. Each vacancy occurring in the office of a member of the board shall be filled by appointment within sixty days after such vacancy occurs. (1994, c. 61.)

Editor's notes. — Concerning the reference in (a) to "the effective date of this article," Acts 1994, c. 61, which amended and reenacted this article, passed March 12, 1994 and became effective 90 days from passage.

§ 22B-4-2. Authority to receive money.

In addition to all other powers and duties of the surface mine board, as prescribed in this chapter or elsewhere by law, the board shall have and may exercise the power and authority to receive any money as a result of the resolution of any case on appeal which shall be deposited to the credit of the special reclamation fund created pursuant to section eleven [§ 22-3-11], article three, chapter twenty-two of this code. (1994, c. 61.)

§ 22B-4-3. Judicial review.

All of the provisions of section nine [§ 22B-1-9], article one of this chapter apply to and govern such review with like effect as if the provisions of said section nine were set forth in extenso in this section, except the petition shall be filed in the circuit court of Kanawha County or the county in which the surface-mining operation is located. (1994, c. 61.)

(e) *Exemptions.* — The following transactions are exempt from the fee imposed by this section:

(1) Disposal of solid waste at a solid waste disposal facility by the person who owns, operates or leases the solid waste disposal facility if it is used exclusively to dispose of waste originally produced by such person in such person's regular business or personal activities or by persons utilizing the facility on a cost-sharing or nonprofit basis;

(2) Reuse or recycling of any solid waste;

(3) Disposal of residential solid waste by an individual not in the business of hauling or disposing of solid waste on such days and times as designated by the director of the division of environmental protection as exempt from the fee imposed pursuant to section eleven [§ 22-15-11], article fifteen, chapter twenty-two of this code; and

(4) Disposal of solid waste at a solid waste disposal facility by a commercial recycler which disposes of thirty percent or less of the total waste it processes for recycling. In order to qualify for this exemption each commercial recycler must keep accurate records of incoming and outgoing waste by weight. Such records must be made available to the appropriate inspectors from the division of environmental protection of solid waste authority, upon request.

(f) *Procedure and administration.* — Notwithstanding section three [§ 11-10-3], article ten, chapter eleven of this code, each and every provision of the "West Virginia Tax Procedure and Administration Act" set forth in article ten [§§ 11-10-1 et seq.], chapter eleven of this code applies to the fee imposed by this section with like effect as if said act were applicable only to the fee imposed by this section and were set forth in extenso herein.

(g) *Criminal penalties.* — Notwithstanding section two [§ 11-9-2], article nine, chapter eleven of this code, sections three through seventeen [§§ 11-9-3 to 11-9-17], article nine, chapter eleven of this code apply to the fee imposed by this section with like effect as if said sections were the only fee imposed by this section and were set forth in extenso herein.

(h) *Dedication of proceeds.* — The net proceeds of the fee collected by the tax commissioner pursuant to this section shall be deposited, at least monthly, in a special revenue account known as the "Solid Waste Planning Fund" which is hereby continued. The solid waste management board shall allocate the proceeds of the said fund as follows:

(1) Fifty percent of the total proceeds shall be divided equally among, and paid over to, each county solid waste authority to be expended for the purposes of this article: Provided, That where a regional solid waste authority exists, such funds shall be paid over to the regional solid waste authority to be expended for the purposes of this article in an amount equal to the total share of all counties within the jurisdiction of said regional solid waste authority; and

(2) Fifty percent of the total proceeds shall be expended by the solid waste management board for:

(A) Grants to the county or regional solid waste authorities for the purposes of this article; and

(B) Administration, technical assistance or other costs of the solid waste management board necessary to implement the purposes of this article and article three [§ 22C-3-1 et seq.] of this chapter.

(i) *Effective date.* — This section is effective on the first day of July, one thousand nine hundred ninety. (1994, c. 61.)

Editor's notes. — This section is effective retroactive to July 1, 1990.

ARTICLE 5.

COMMERCIAL HAZARDOUS WASTE MANAGEMENT FACILITY SITING BOARD.

Sec.

§ 22C-5-1. Short title.

This article may be known and cited as the "Commercial Hazardous Waste Management Facility Siting Act." (1994, c. 61.)

§ 22C-5-2. Purpose and legislative findings.

(a) The purpose of this article is to establish a state commercial hazardous waste management facility siting board and to establish the procedure for which approval certificates are granted or denied for commercial hazardous waste management facilities.

(b) The Legislature finds that hazardous waste is generated throughout the state as a by-product of the materials used and consumed by individuals, businesses, enterprise and governmental units in the state, and that the proper management of hazardous waste is necessary to prevent adverse effects on the environment and to protect public health and safety. The Legislature further finds that:

(1) The availability of suitable facilities for the treatment, storage and disposal of hazardous waste is necessary to protect the environment resources and preserve the economic strength of this state and to fulfill the diverse needs of its citizens;

(2) Whenever a site is proposed for the treatment, storage or disposal of hazardous waste, the nearby residents and the affected county and municipalities may have a variety of reasonable concerns regarding the design, construction, operation, closing and long-term care of facilities located at the site, the effect of the facility upon their community's economic development

and environmental quality and the incorporation of such concerns into the siting process;

(3) Local authorities have the responsibility for promoting public health, safety, convenience and general welfare, encouraging planned and orderly land use development, recognizing the needs of industry and business, including solid waste disposal and the treatment, storage and disposal of hazardous waste and that reasonable concerns of local authorities should be considered in the siting of commercial hazardous waste management facilities; and

(4) New procedures are needed to resolve many of the conflicts which arise during the process of siting commercial hazardous waste management facilities. (1994, c. 61.)

§ 22C-5-3. Definitions.

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

(a) "Board" means the commercial hazardous waste management facility siting board established pursuant to section four [§ 22C-5-4] of this article;

(b) "Commercial hazardous waste management facility" means any hazardous waste treatment, storage or disposal facility which accepts hazardous waste, as identified or listed by the director of the division of environmental protection under article eighteen [§ 22-18-1 et seq.], chapter twenty-two of this code, generated by sources other than the owner or operator of the facility and does not include an approved hazardous waste facility owned and operated by a person for the sole purpose of disposing of hazardous wastes created by that person or such person and other persons on a cost-sharing or nonprofit basis;

(c) "Hazardous waste management facility" means any facility including land and structures, appurtenances, improvements and equipment used for the treatment, storage or disposal of hazardous wastes, which accepts hazardous waste for storage, treatment or disposal. For the purposes of this article, it does not include: (i) Facilities for the treatment, storage or disposal of hazardous wastes used principally as fuels in an on-site production process; or (ii) facilities used exclusively for the pretreatment of wastes discharged directly to a publicly owned sewage treatment works. A facility may consist of one or more treatment, storage or disposal operational units. (1994, c. 61.)

§ 22C-5-4. Establishment of commercial hazardous waste management facility siting board; composition; appointment; compensation; powers; rules; and procedures.

(a) The commercial hazardous waste management facility siting board is continued. It consists of nine members including the director of the division of environmental protection and the chief of the office of air quality of the division of environmental protection who are nonvoting members ex officio, two ad hoc members appointed by the county commission of the county in which the

other permanent members to be appointed by the governor with the advice and consent of the Senate, two of whom are representative of industries engaged in business in this state and three of whom are representative of the public at large. No two or more of the five permanent voting members of the board appointed by the governor shall be from the same county. Upon initial appointment one of said other five members shall be appointed for five years, one for four years, one for three years, one for two years and one for one year. Thereafter, said permanent members shall be appointed for terms of five years each. Vacancies occurring other than by expiration of a term shall be filled by the governor in the same manner as the original appointment for the unexpired portion of the term. The term of the ad hoc members continue until a final determination has been made in the particular proceeding for which they are appointed. Four of the voting members on the board constitute a quorum for the transaction of any business, and the decision of four voting members of the board is action of the board. No person is eligible to be an appointee of the governor to the board who has any direct personal financial interest in any commercial hazardous waste management enterprise. The five permanent voting members of the board shall annually elect from among themselves a chair no later than the thirty-first day of July of each calendar year. The board shall meet upon the call of the chair or upon the written request of at least three of the voting members of the board.

(b) Each member of the board, other than the two members ex officio, shall be paid, out of funds appropriated for such purpose as compensation for his or her services on the board, the sum of seventy-five dollars for each day or substantial portion thereof that he or she is actually engaged in their duties pursuant to this article. In addition, each member, including members ex officio, shall be reimbursed, out of moneys appropriated for such purpose, all reasonable sums which he or she necessarily expends in the discharge of duties as a member of the board. The division of environmental protection shall make available to the board such professional and support staff and services as may be necessary in order to support the board in carrying out its responsibilities within the limit of funds available for this purpose. The office of the attorney general shall provide legal advice and representation to the board as requested, within the limit of funds available for this purpose, or the board, with the written approval of the attorney general, may employ counsel to represent it.

(c) After the eighth day of April, one thousand nine hundred eighty-nine, no person shall construct or commence construction of a commercial hazardous waste management facility without first obtaining a certificate of site approval issued by the board in the manner prescribed herein. For the purpose of this section, "construct" and "construction" means (i) with respect to new facilities, the significant alteration of a site to install permanent equipment or structures or the installation of permanent equipment or structures; (ii) with respect to existing facilities, the alteration or expansion of existing structures or facilities to include accommodation of hazardous waste, or expansion of more than fifty percent the area or capacity of an existing hazardous waste facility, or any

substantially different type of facility. Construction does not include preliminary engineering or site surveys, environmental studies, site acquisition, acquisition of an option to purchase or activities normally incident thereto.

(d) Upon receiving a written request from the owner or operator of the facility, the board may allow, without going through the procedures of this article, any changes in the facilities which are designed (1) to prevent a threat to human health or the environment because of an emergency situation; (2) to comply with federal or state laws and regulations; or (3) to result in demonstrably safer or environmentally more acceptable processes.

(e) An application for certificate of site approval consists of a copy of all hazardous waste permits, if any, and permit applications, if any, issued by or filed with any state permit-issuing authority pursuant to article eighteen [§ 22-18-1 et seq.], chapter twenty-two of this code and a detailed written analysis with supporting documentation of the following factors:

(1) The nature of the probable environmental and economic impacts, including, but not limited to, specification of the predictable adverse effects on quality of natural environment, public health and safety, scenic, historic, cultural and recreational values, water and air quality, wildlife, property values, transportation networks and an evaluation of measures to mitigate such adverse effects;

(2) The nature of the environmental benefits likely to be derived from such facility, including the resultant decrease in reliance upon existing waste disposal facilities which do not comply with applicable laws and rules, and a reduction in fuel consumption and vehicle emissions related to long-distance transportation of hazardous waste; and

(3) The economic benefits likely to be derived from such facility, including, but not limited to, a reduction in existing costs for the disposal of hazardous waste, improvement to the state's ability to retain and attract business and industry due to predictable and stable waste disposal costs, and any economic benefits which may accrue to the municipality or county in which the facility is to be located.

(f) On or before sixty calendar days after the receipt of such application, the board shall mail written notice to the applicant as to whether or not such application is complete. If, or when, the application is complete, the board shall notify the applicant and the county commission of the county in which the facility is or is proposed to be located. Said county commission shall thereupon, within thirty days of receipt of such notice, appoint the two ad hoc members of the board to act upon the application.

(g) Immediately upon determining that an application is complete, the board shall, at the applicant's expense, cause a notice to be published in the state register, which shall be no later than thirty calendar days after the date of such written notice of completeness, and shall provide notice to the chief executive office of each municipality in which the proposed facility is to be located and the county commission of the county in which the facility is proposed to be located, and shall direct the applicant to provide reasonable notice to the public which shall, at a minimum, include publication as a Class [illegible] newspaper of general circulation

in the vicinity in which the proposed facility is to be located identifying the proposed location, type of facility and activities involved, the name of the permittee, and the date, time and place at which the board will convene a public hearing with regard to the application. The date of the hearing shall be set by the board and shall commence within sixty days of the date of notice of completeness of an application.

(h) The board shall conduct a public hearing upon the application in the county in which the facility is to be located and shall keep an accurate record of such proceedings by stenographic notes and characters or by mechanical or electronic means. Such proceedings shall be transcribed at the applicant's expense. The board may accept both written and oral comments on the application.

(i) The commercial hazardous waste management facility siting board may request further information of the applicant and shall render a decision based upon the application and the record, either, requesting further information, granting a certificate of site approval, denying it, or granting it upon such terms, conditions and limitations as the board deems appropriate. The board shall base its decision upon the factors set forth in subsection (e). The written decision of the board containing its findings and conclusions shall be mailed by certified mail to the applicant and to any requesting person on or before sixty calendar days after receipt by the board of a complete record of the hearing.

(j) The board may exercise all powers necessary or appropriate to carry out the purposes and duties provided in this article, including the power to promulgate rules in compliance with chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code. (1994, c. 61.)

§ 22C-5-5. Effect of certification.

A grant of an approval certificate shall supersede any local ordinance or regulation that is inconsistent with the terms of the approval certificate. Nothing in this chapter affects the authority of the host community to enforce its regulations and ordinances to the extent that they are not inconsistent with the terms and conditions of the approval certificate. Grant of an approval certificate does not preclude or excuse the applicant from the requirement to obtain approval or permits under this chapter or other state or federal laws. (1994, c. 61.)

§ 22C-5-6. Commercial hazardous waste management facility siting fund; fees.

(a) There is hereby continued in the state treasury a special revenue fund entitled the "commercial hazardous waste management facility siting fund" which may be expended by the director of the division of environmental protection for the following:

(1) The necessary expenses of the board which may include expenses and compensation for each member of the board as authorized by t[illegible]

(2) Administration, professional and support services provide[illegible] division to the board.

(3) Legal counsel and representation provided by the attorney general to the board for the purposes of this article.

(b) The director of the division of environmental protection shall promulgate rules, pursuant to section one [§ 29A-1-1], article one, chapter twenty-nine-a of this code, establishing reasonable fees to be charged each applicant for a certificate of site approval. Such fees shall be calculated to recover the reasonable and necessary expenses of the board, division of environmental protection and attorney general which such agencies incur as pursuant to this article. (1994, c. 61.)

§ 22C-5-7. Judicial review.

(a) Any person having an interest adversely affected by a final decision made and entered by the board is entitled to judicial review thereof in the circuit court of Kanawha County, or the circuit court of the county in which the facility is, or is proposed to be, situated, such appeal to be perfected by the filing of a petition with the court within sixty days of the date of receipt by the applicant of the board's written decision.

(b) The review shall be conducted by the court without a jury and shall be upon the record made before the board except that in cases of alleged irregularities in procedure before the board not shown in the record, testimony thereon may be taken before the court. The court may hear oral arguments and require written briefs.

The court may affirm the order or decision of the board or remand the case for further proceedings. It may reverse, vacate or modify the order or decision of the board if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority or jurisdiction of the board;

(3) Made upon unlawful procedures;

(4) Affected by other error of law;

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(c) The judgment of the circuit court is final unless reversed, vacated or modified on appeal to the supreme court of appeals. 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.

(d) Legal counsel and services for the board in all appeal proceedings shall be provided by the attorney general. (1994, c. 61.)

§ 22C-5-8. Remedies.

(a) Any person who violates this section shall be compelled by injunction, in a proceeding instituted in the circuit court or the locality where the facility or proposed facility is to be located, to cease the violation.

(b) Such an action may be instituted by the board, director of the division of environmental protection, political subdivision in which the violation occurs or any other person aggrieved by such violation. In any such action, it is not necessary for the plaintiff to plead or prove irreparable harm or lack of an adequate remedy at law. No person shall be required to post any injunction bond or other security under this section.

(c) No action may be brought under this section after an approval certificate has been issued by the board, notwithstanding the pendency of any appeals or other challenges to the board's action.

(d) In any action under this section, the court may award reasonable costs of litigation, including attorney and expert witness fees, to any party if the party substantially prevails on the merits of the case and if in the determination of the court the party against whom the costs are requested has acted in bad faith. (1994, c. 61.)

ARTICLE 6.

HAZARDOUS WASTE FACILITY SITING APPROVAL.

§ 22C-6-1. Legislative purpose.

The purpose of this article is to provide the opportunity for public participation in the decision to locate commercial hazardous waste management facilities and to locate any hazardous waste management facility which disposes of greater than ten thousand tons of hazardous waste per annum in West Virginia. (1994, c. 61.)

§ 22C-6-2. Definitions.

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

(a) "Board" means the commercial hazardous waste management facility siting board established pursuant to section three [§ 22C-5-3], article five of this chapter;

(b) "Commercial hazardous waste management facility" means any hazardous waste treatment, storage or disposal facility which accepts hazardous waste, as identified or listed by the director of the division of environmental protection under article eighteen [§ 22-18-1 et seq.], chapter twenty-two of this code, generated by sources other than the owner or operator of the facility and does not include an approved hazardous waste facility owned and operated by a person for the sole purpose of disposing of hazardous wastes created by that person or such person and other persons on a cost-sharing or nonprofit basis;

(c) "Hazardous waste management facility" means any facility including land and structures, appurtenances, improvements and equipment used for the treatment, storage or disposal of ha[illegible]

ous waste for storage, treatment or disposal. For the purposes of this article, it does not include: (i) Facilities for the treatment, storage or disposal of hazardous wastes used principally as fuels in an on-site production process; or (ii) facilities used exclusively for the pretreatment of wastes discharged directly to a publicly owned sewage treatment works. A facility may consist of one or more treatment, storage or disposal operational units.

(d) "On site" means the location for disposal of hazardous waste including the hazardous waste generated at the location of disposal or generated at some location other than the location of disposal. (1994, c. 61.)

§ 22C-6-3. Procedure for public participation.

(a) From and after the fifth day of June, one thousand nine hundred ninety-two, in order to obtain approval to locate either a commercial hazardous waste management facility or a hazardous waste management facility which disposes of greater than ten thousand tons per annum on site in this state, an applicant shall:

(1) File a pre-siting notice with the county or counties in which the facility is to be located or proposed. Such notice shall be submitted on forms prescribed by the commercial hazardous waste management facility siting board;

(2) File a pre-siting notice with the commercial hazardous waste management facility siting board; and

(3) File a pre-siting notice with the division of environmental protection.

(b) If a pre-siting notice is filed in accordance with subsection (a) of this section, the county commission shall publish a Class II legal advertisement in compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this code, in a newspaper of general circulation in the counties wherein the hazardous waste management facility is to be located. Upon an affirmative vote of the majority of the county commissioners or upon the written petition of registered voters residing in the county equal to not less than fifteen percent of the number of votes cast within the county for governor at the preceding gubernatorial election, which petition shall be filed with the county commission within sixty days after the last date of publication of the notice provided in this section, the county commission shall, upon verification of the required number of signatures on the petition, and not less than fifty-six days before the election, order a referendum be placed upon the ballot: Provided, That such a referendum is not required for a hazardous waste management facility for which at least ninety percent of the capacity is designated for hazardous waste generated at the site of disposal. Any referendum conducted pursuant to this section shall be held at the next primary, general or other countywide election.

(1) Such referendum is to determine whether it is the will of the voters of the county that a commercial hazardous waste management facility be located in the county [illegible] a hazardous waste management facility disposing of greater than ten th[illegible] tons of hazardous waste per annum on site be located in the county. Any [illegible]on at which such question of locating a hazardous waste [illegible] shall be held at the voting precincts

established for holding primary or general elections. All of the provisions of the general election laws, when not in conflict with the provisions of this article, apply to voting and elections hereunder, insofar as practicable. The secretary of state shall prescribe the form of the petition which shall include the printed name, address and date of birth of each person whose signature appears on the petition.

(2) The ballot, or the ballot labels where voting machines are used, shall have printed thereon substantially the following depending upon the type of facility to be located with the county:

"Shall a commercial hazardous waste management facility be located within _____ County, West Virginia?

☐ For the facility

☐ Against the facility

(Place a cross mark in the square opposite your choice.)" or,

"Shall a hazardous waste management facility disposing of greater than ten thousand tons per annum on site be located within _____ County, West Virginia?

☐ For the facility

☐ Against the facility

(Place a cross mark in the square opposite your choice.)"

(3) If a majority of the legal votes cast upon the question is against the facility, then the county commission shall notify the division of environmental protection and the commercial hazardous waste management facility siting board, in the case of a commercial facility, of the result and the commercial hazardous waste management facility siting board or division of environmental protection, as the case may be, shall not proceed any further with the application. If a majority of the legal votes cast upon the question is for the facility, then the application process as set forth in article eighteen [§ 22-18-1 et seq.], chapter twenty-two of this code and article five [§ 22C-5-1 et seq.] of this chapter, in the case of a commercial hazardous waste management facility, may proceed: Provided, That such vote is not binding on nor does it require the commercial hazardous waste management facility siting board to grant a certificate of site approval or the division of environmental protection to issue the permit, as the case may be. If the majority of the legal votes cast is against the question, the question may be submitted to a vote at any subsequent election in the manner herein specified: Provided, however, That the question may not be resubmitted to a vote until two years after the date of the previous referendum. (1994, c. 61.)

ARTICLE 7.

OIL AND GAS INSPECTORS' EXAMINING BOARD.

Sec.