

US EPA ARCHIVE DOCUMENT

## West Virginia Statutes

- Chapter 22B Environmental Boards;
- Chapter 22C Environmental Resources; Boards, Authorities, Commissions, and Compacts, 1994 Replacement Volume

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

## CHAPTER 22B. ENVIRONMENTAL BOARDS.

### Article

1. General Policy and Purpose.
2. Air Quality Board.
3. Environmental Quality Board.
4. Surface Mine Board.

**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article 5, §§ 22B-5-1 to 22B-5-12 (enacted by Acts 1992, c. 3), concerning the West Virginia Abandoned Well Act was repealed by the amendment and reenactment of this chapter.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.

Sec.		Sec.	
22B-1-1.	Declaration of policy and purpose.	22B-1-7.	Appeals to boards.
22B-1-2.	Definitions.	22B-1-8.	General provisions governing discovery.
22B-1-3.	General administration.	22B-1-9.	General provisions for judicial review.
22B-1-4.	General provisions applicable to all boards and board members.	22B-1-10.	Confidentiality.
22B-1-5.	General powers and duties of boards.	22B-1-11.	Conflict of interest.
22B-1-6.	General procedural provisions applicable to all boards.	22B-1-12.	Savings provisions.

**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. 87; and 1992, c. 71), concerning the division of oil and gas, and administration and enforce-

ment. 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.

#### § 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

" . . . and to maintain continuity of the boards' functions and

## § 22B-1-2

### ENVIRONMENTAL BOARDS

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- General administration.

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

### GENERAL POLICY AND PURPOSE

## § 22B-1-3

(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 book 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 chief or director's order, permit or official action pending determination of the appeal, 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 decision is lawful and reasonable, or if the board finds that the decision was not supported 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.

Sec.	Sec.
22B-2-1. Air quality board; composition; appointment and terms of members; vacancies.	22B-2-2. Authority to receive money.
	22B-2-3. Judicial review of air quality board orders.

**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.

§ 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, 1994 and became effective 90 days from passage.



**§ 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.**

Sec. 22B-3-1. Environmental quality board; composition and organization; appointment, qualifications, terms, vacancies.	Sec. 22B-3-3. Judicial review.
22B-3-2. Authority of board; additional definitions.	22B-3-4. Environmental quality board rule-making authority.
	22B-3-5. Environmental quality board continued.

**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 1986, 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] 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.

Sec.

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

Sec.

22B-4-2. Authority to receive money.  
22B-4-3. Judicial review.

**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.

### § 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 article, passed March 12, 1994 and became in (a) to "the effective date of this article," Acts effective 90 days from passage. 1994, c. 61, which amended and reenacted this

### § 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.)

## § 22C-4-3c

## ENVIRONMENTAL RESOURCES

(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

## HAZARDOUS WASTE MANAGEMENT FACILITY SITING § 22C-5-2

(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.		Sec.	
22C-5-1.	Short title.	22C-5-5.	Effect of certification.
22C-5-2.	Purpose and legislative findings.	22C-5-6.	Commercial hazardous waste management facility siting fund; fees.
22C-5-3.	Definitions.	22C-5-7.	Judicial review.
22C-5-4.	Establishment of commercial hazardous waste management facility siting board; composition; appointment; compensation; powers; rules; and procedures.	22C-5-8.	Remedies.

## § 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 change in design or process of a hazardous waste facility that will result in a

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 officer 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

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 the
- (2) Administration, professional and support services provided by the 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.

Sec.

22C-6-1. Legislative purpose.

22C-6-2. Definitions.

Sec.

22C-6-3. Procedure for public participation.

### § 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 hazardous waste.

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 or that a hazardous waste management facility disposing of greater than ten thousand tons of hazardous waste per annum on site be located in the county. Any referendum at which such question of locating a hazardous waste management facility 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.

22C-7-1. Oil and gas inspector; supervising inspectors; tenure; oath and bond.

22C-7-2. Oil and gas inspectors; eligibility for

Sec.

22C-7-3. Oil and gas inspectors; appointment; salary; experience; qualifications; board created; term; reappointment; ap-