WEST VIRGINIA CODE

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1997 Supplement

Including Acts passed during the 1997 Regular and First Extraordinary Sessions

Prepared by the Editorial Staff of the Publishers

Under the Supervision of

RICHARD W. WALTER, JR.
PETER R. ROANE
RUTH P. KNIGHT
LYNN P. SEUFFERT

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Preface

Statutes

The 1997 Supplement to the West Virginia Code Annotated reflects the laws of West Virginia as amended by the West Virginia Legislature through the end of its 1997 Regular and First Extraordinary Sessions. Legislation is arranged according to the Legislature's instructions and pursuant to the 1931 Official Code of West Virginia, on which this Code is based.

Effective Date

Acts of the West Virginia Legislature become effective 90 days from passage unless the Legislature specifies a different effective date. For acts passed during the 1997 Regular Session, 90 days from passage is not later than July 19, 1997. Where the Legislature has accelerated or postponed the effective date of an act, this supplement contains a note to that effect under the provisions affected.

Annotations

This supplement contains relevant annotations from the following sources:

South Eastern Reporter, 2d Series, through 482 S.E.2d 236.
U.S. Supreme Court Reports, Lawyer's Edition, 2d Series, through 137 L. Ed. 2d 368.
Federal Reporter, 3d Series, through 110 F.3d 74.
Federal Supplement, through 956 F. Supp. 1028.
Federal Rules Decisions, through 170 F.R.D. 533.
Bankruptcy Reporter, through 207 Bankr. 33.
Opinions of the Attorney General, through July 11, 1994.
West Virginia Law Review, through 99 W. Va. L. Rev. 233.
American Law Reports, 5th Series, through 46 ALR5th 955.

Contents

A table following this preface summarizes the contents of this pamphlet and its corresponding bound volume. For a complete, updated table of contents for the entire Code, see the supplement pamphlet for Volume 1 in conjunction with its bound volume.

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A topical index to legislation enacted through the end of the 1997 Sessions appears in 1997 Replacement Volumes 18 and 19 of the West Virginia Code Annotated. Consult the foreword at the beginning of the index for more information about the index and tips for easier use of the index.

User Information

For information and suggestions regarding the use of the West Virginia Code Annotated, please consult the User's Guide near the front of West Virginia Code Annotated Volume 1, and its accompanying supplement pamphlet.

We welcome suggestions, comments and questions concerning the West Virginia Code Annotated. Call us toll-free at 1-800-446-3410, fax us toll-free at 1-800-643-1280, email us at custserv@michie.com, or write West Virginia Code Editor, Michie, P.O. Box 7587, Room 322, Charlottesville, VA 22906-7587.

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CHAPTER 22.

ENVIRONMENTAL RESOURCES.

Article

W. Va. Law Review. — Flannery, Beckett and McThomas, "Consolidated Environmental Regulation in West Virginia," 97 W. Va. L. Rev. 401 (1995).

ARTICLE 1.

DIVISION OF ENVIRONMENTAL PROTECTION.

§ 22-1-4. Division of environmental protection continued.

Pursuant to the provisions of article ten [§ 4-10-1 et seq.], chapter four of this code, the division of environmental protection shall continue to exist until the first day of July, one thousand nine hundred ninety-nine. (1994, c. 61; 1995, c. 231; 1996, c. 228; 1997, c. 189.)

Effect of amendment of 1995. — The amendment, effective July 1, 1995, rewrote the section.

Effect of amendment of 1996. — The amendment extended the division's existence from July 1, 1996 to July 1, 1997, and inserted "monitoring ... further review."

Effect of amendment of 1997. — The amendment, effective July 1, 1997, substituted "one thousand nine hundred ninety-nine" for "one thousand nine hundred ninety-seven," and deleted "to allow for the completion of a performance audit, monitoring of compliance with recommendations contained in the completed portions of the performance audit and further review by the joint committee on government operations" from the end.

§ 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 obligations of public funds under this subdivision shall not exceed or be 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;

(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; and

(7) Notwithstanding any provisions of this code to the contrary, employ in-house counsel to perform all legal services for the director and the division, including, but not limited to, representing the director, any chief, the division or any office thereof in any administrative proceeding or in any proceeding in any state or federal court. Additionally, the director may call upon the attorney general for legal assistance and representation as provided by law.

(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 the 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 IV 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; 1995, c. 103.)

Effect of amendment of 1996. — The amendment added (d)(7); and made minor punctuation changes.

§ 22-1-7. Offices within division; continuation of the office of water resources.

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.

Pursuant to the provisions of article ten [§ 4-10-1 et seq.], chapter four of this code, the office of water resources within the division of environmental protection shall continue to exist until the first day of July, one thousand nine hundred ninety-nine. (1994, c. 61; 1995, c. 232; 1996, c. 229; 1997, c. 190.)

Effect of amendment of 1995. — The amendment, effective July 1, 1995, added the last paragraph.

Effect of amendment of 1996. — The amendment, in the last paragraph of this section, substituted "one thousand nine hundred ninety-seven" for "one thousand nine hundred ninety-six," and substituted "monitoring of compliance ... for further review" for "the completion of a preliminary performance review."

Effect of amendment of 1997. — The amendment, effective July 1, 1997, in the undesignated last paragraph, substituted "one thousand nine hundred ninety-nine" for "one thousand nine hundred ninety-seven," and deleted "to allow for monitoring of compliance with recommendations contained in the preliminary performance review and to allow for further review by the joint committee on government operations" from the end of the paragraph.

§ 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 three hundred thousand dollars, to be assessed against laboratory owners or operators in an amount 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, 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 considered 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 pursuant to this section if the laboratories provide written documentation that approval has been received under requirements in their state and determined by the director to be equivalent to the West Virginia laboratory certification program. The reciprocal certification shall be granted only for testing methods and parameters for which the laboratory holds a valid authorization in the 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 remains 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 is 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 that person had relied upon a laboratory which loses its certification, shall be granted thirty days after notice of the invalidated test results 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 continued 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, including the interest thereon, of the environmental laboratory certification fund solely for the administration of the requirements of this section.

(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 of a certification, 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 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; 1996, c. 124.)

Effect of amendment of 1996. — The amendment, in (a), substituted "three hundred thousand dollars" for "one hundred fifty thousand dollars" in the first sentence and deleted "beginning the first day of July, one thousand nine hundred ninety-five" following "year" in the second sentence; in (b), substituted "considered" for "deemed" in the first sentence, and, in the second sentence, deleted "without performance testing or assessment of certification fee" preceding "pursuant to this section" and substituted "in their state and determined" for "in another state determined"; in (h), substituted "continued" for "established" and deleted the proviso from the end; and made stylistic changes.

ARTICLE 3.

SURFACE COAL MINING AND RECLAMATION ACT.

W. Va. Law Review. — "Subjacent Support: A Right Afforded to Surface Estates Alone?" 97 W. Va. L. Rev. 1111 (1995).

Relation to federal act.

In accord with bound volume. Schultz v. Consolidation Coal Co., 197 W. Va. 375, 475 S.E.2d 467 (1996).

A state regulation enacted pursuant to this article must be read in a manner consistent with federal regulations enacted in accordance with the federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq. Schultz v. Consolidation Coal Co., 197 W. Va. 375, 475 S.E.2d 467 (1996).

§ 22-3-1. Short title.

Cited in State ex rel. W. Va. Highlands Conservancy, Inc. v. West Virginia Div. of Envtl. Protection, 191 W. Va. 719, 447 S.E.2d 920 (1994); Elk Run Coal Co. v. Babbitt, 919 F. Supp. 225 (S.D.W. Va. 1996).

22-3-2. Legislative findings and purpose; jurisdiction vested in division of environmental protection; authority of director; inter-departmental cooperation.

Cited in State ex rel. W. Va. Highlands Conservancy, Inc. v. West Virginia Div. of Envtl. Protection, 191 W. Va. 719, 447 S.E.2d 920 (1994).

§ 22-3-3. Definitions.

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

(a) "Adequate treatment" means treatment of water by physical, chemical or other approved methods in a manner so that the treated water does not violate the effluent limitations or cause a violation of the water quality standards established for the river, stream or drainway into which such water is released.

(b) "Affected area" means, when used in the context of surface-mining activities, all land and water resources within the permit area which are disturbed or utilized during the term of the permit in the course of surface-mining and reclamation activities. "Affected area" means, when used in the context of underground mining activities, all surface land and water resources affected during the term of the permit: (1) By surface operations or facilities incident to underground mining activities; or (2) by underground operations.

(c) "Adjacent areas" means, for the purpose of permit application, renewal, revision, review and approval, those land and water resources, contiguous to or near a permit area, upon which surface-mining and reclamation operations conducted within a permit area during the life of such operations may have an impact. "Adjacent areas" means, for the purpose of conducting surface-mining and reclamation operations, those land and water resources contiguous to or near the affected area upon which surface-mining and reclamation operations conducted within a permit area during the life of such operations may have an impact.

(d) "Applicant" means any person who has or should have applied for any permit pursuant to this article.

(e) "Approximate original contour" means that surface configuration achieved by the backfilling and grading of the disturbed areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated: Provided, That water impoundments may be permitted pursuant to subdivision (8), subsection (b), section thirteen [§ 22-3-13(b)(8)] of this article: Provided, however, That minor deviations may

be permitted in order to minimize erosion and sedimentation, retain moisture to assist revegetation, or to direct surface runoff.

(f) "Assessment officer" means an employee of the division, other than a surface-mining reclamation supervisor, inspector or inspector-in-training, appointed by the director to issue proposed penalty assessments and to conduct informal conferences to review notices, orders and proposed penalty assessments.

(g) "Breakthrough" means the release of water which has been trapped or impounded, or the release of air into any underground cavity, pocket or area as a result of surface-mining operations.

(h) "Coal processing wastes" means earth materials which are or have been combustible, physically unstable or acid-forming or toxic-forming, which are wasted or otherwise separated from product coal, and slurried or otherwise transported from coal processing plants after physical or chemical processing, cleaning or concentrating of coal.

(i) "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.

(j) "Disturbed area" means an area where vegetation, topsoil or overburden has been removed or placed by surface-mining operations, and reclamation is incomplete.

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

(l) "Imminent danger to the health or safety of the public" means the existence of such condition or practice, or any violation of a permit or other requirement of this article, which condition, practice or violation could reasonably be expected to cause substantial physical harm or death to any person outside the permit area before such condition, practice or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose the person to the danger during the time necessary for the abatement.

(m) "Minerals" means clay, coal, flagstone, gravel, limestone, manganese, sand, sandstone, shale, iron ore and any other metal or metallurgical ore.

(n) "Operation" means those activities conducted by an operator who is subject to the jurisdiction of this article.

(o) "Operator" means any person who is granted or who should obtain a permit to engage in any activity covered by this article and any rule promulgated hereunder and includes any person who engages in surface-mining or surface-mining and reclamation operations, or both. The term shall also be construed in a manner consistent with the federal program pursuant to the federal Surface-Mining Control and Reclamation Act of 1977 [30 U.S.C. § 1201 et seq.], as amended.

(p) "Permit" means a permit to conduct surface-mining operations pursuant to this article.

(q) "Permit area" means the area of land indicated on the approved proposal map submitted by the operator as part of the operator's application showing

the location of perimeter markers and monuments and shall be readily identifiable by appropriate markers on the site.

(r) "Permittee" means a person holding a permit issued under this article.

(s) "Person" means any individual, partnership, firm, society, association, trust, corporation, other business entity or any agency, unit or instrumentality of federal, state or local government.

(t) "Prime farmland" has the same meaning as that prescribed by the United States secretary of agriculture on the basis of such factors as moisture availability, temperature regime, chemical balance, permeability, surface layer composition, susceptibility to flooding and erosion characteristics, and which historically have been used for intensive agricultural purposes and as published in the federal register.

(u) "Surface mine", "surface-mining" or "surface-mining operations" means:

(1) Activities conducted on the surface of lands for the removal of coal, or, subject to the requirements of section fourteen [§ 22-3-14] of this article, surface operations and surface impacts incident to an underground coal mine, including the drainage and discharge therefrom. Such activities include: Excavation for the purpose of obtaining coal, including, but not limited to, such common methods as contour, strip, auger, mountaintop removal, box cut, open pit and area mining; the uses of explosives and blasting; reclamation; in situ distillation or retorting, leaching or other chemical or physical processing; the cleaning, concentrating or other processing or preparation and loading of coal for commercial purposes at or near the mine site; and

(2) The areas upon which the above activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land, the use of which is incidental to any such activities; all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage; and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities: Provided, That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed sixteen and two-thirds percent of the tonnage of minerals removed for purposes of commercial use or sale, or coal prospecting subject to section seven [§ 22-3-7] of this article. Surface-mining may not include any of the following:

(i) Coal extraction authorized pursuant to a government-financed reclamation contract;

(ii) Coal extraction authorized as an incidental part of development of land for commercial, residential, industrial, or civic use; or

(iii) The reclamation of an abandoned or forfeited mine by a no cost reclamation contract.

(v) "Underground mine" means the surface effects associated with the shaft, slopes, drifts or inclines connected with excavations penetrating coal seams or strata and the equipment connected therewith which contribute directly or indirectly to the mining, preparation or handling of coal.

(w) "Significant, imminent environmental harm to land, air or water resources" means the existence of any condition or practice, or any violation of a permit or other requirement of this article, which condition, practice or violation could reasonably be expected to cause significant and imminent environmental harm to land, air or water resources. The term "environmental harm" means any adverse impact on land, air or water resources, including, but not limited to, plant, wildlife and fish, and the environmental harm is imminent if a condition or practice exists which is causing such harm or may reasonably be expected to cause such harm at any time before the end of the abatement time set by the director. An environmental harm is significant if that harm is appreciable and not immediately repairable.

(x) "Unanticipated event or condition" as used in section eighteen [§ 22-3-18] of this article means an event or condition in a remining operation that was not contemplated by the applicable surface coal mining and reclamation permit.

(y) "Lands eligible for remining" means those lands that would be eligible for expenditures under section four [§ 22-2-4], article two of this chapter. Surface-mining operations on lands eligible for remining may not affect the eligibility of such lands for reclamation and restoration under article two [§ 22-2-1 et seq.] of this chapter. In event the bond or deposit for lands eligible for remining is forfeited, funds available under article two of this chapter may be used to provide for adequate reclamation or abatement. However, if conditions constitute an emergency as provided in section 410 of the federal Surface-Mining Control and Reclamation Act of 1977 [30 U.S.C. § 1201 et seq.], as amended, then those federal provisions shall apply.

(z) "Replacement of water supply" means with respect to water supplies contaminated, diminished, or interrupted, provision of water supply on both a temporary and permanent basis of equivalent quality and quantity. Replacement includes provision of an equivalent water delivery system and payment of operation and maintenance cost in excess of customary and reasonable delivery cost for the replaced water supplies.

Upon agreement by the permittee and the water supply owner, the obligation to pay such costs may be satisfied by a one-time payment in an amount which covers the present annual operation and maintenance costs for a period agreed to by the permittee and the water supply owner. (1994, c. 61; 1997, c. 133.)

Effect of amendment of 1997. — The amendment, in (u)(2), added "Surface-mining may not include any of the following:" and the subsequent paragraphs designated as (i), (ii), and (iii); added (x), (y) and (z); and made punctuation changes.

Quoted in State ex rel. W. Va. Highlands Conservancy, Inc. v. West Virginia Div. of Envtl. Protection, 191 W. Va. 719, 447 S.E.2d 920 (1994).

Cited in Cat Run Coal Co. v. Babbitt, 932 F. Supp. 772 (S.D.W. Va. 1996).

§ 22-3-8. Prohibition of surface mining without a permit; permit requirements; successor in interest; duration of permits; proof of insurance; termination of permits; permit fees.

No person may engage in surface-mining operations unless such person has first obtained a permit from the director in accordance with the following:

(1) All permits issued pursuant to the requirements of this article shall be issued for a term not to exceed five years: Provided, That if the applicant demonstrates that a specified longer term is reasonably needed to allow the applicant to obtain necessary financing for equipment and the opening of the operation, and if the application is full and complete for such specified longer term, the director may extend a permit for such longer term: Provided, however, That subject to the prior approval of the director, with such approval being subject to the provisions of subsection (c), section eighteen [§ 22-3-18(c)] of this article, a successor in interest to a permittee who applies for a new permit, or transfer of a permit, within thirty days of succeeding to such interest, and who is able to obtain the bond coverage of the original permittee, may continue surface-mining and reclamation operations according to the approved mining and reclamation plan of the original permittee until such successor's permit application or application for transfer is granted or denied.

(2) Proof of insurance is required on an annual basis.

(3) A permit terminates if the permittee has not commenced the surface-mining operations covered by such permit within three years of the date the permit was issued: Provided, That the director may grant reasonable extensions of time upon a timely showing that such extensions are necessary by reason of litigation precluding such commencement, or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee: Provided, however, That with respect to coal to be mined for use in a synthetic fuel facility or specific major electric generating facility, the permittee shall be deemed to have commenced surface-mining operations at such time as the construction of the synthetic fuel or generating facility is initiated.

(4) Each application for a new surface-mining permit filed pursuant to this article shall be accompanied by a fee of one thousand dollars. All permit fees and renewal fees provided for in this section or elsewhere in this article shall be collected by the director and deposited with the treasurer of the state of West Virginia to the credit of the operating permit fees fund and shall be used, upon requisition of the director, for the administration of this article.

(5) Prior to the issuance of any permit, the director shall ascertain from the commissioner of the division of labor whether the applicant is in compliance with section fourteen [§ 21-5-14], article five, chapter twenty-one of this code. Upon issuance of the permit, the director shall forward a copy to the commissioner of the division of labor, who shall assure continued compliance under such permit.

(6) (A) Prior to the issuance of any permit the director shall ascertain from the commissioner of the bureau of employment programs whether the appli-

cant is in compliance with the provisions of section five [§ 23-2-5], article two, chapter twenty-three of this code with regard to any required subscription to the workers' compensation fund, the payment of premiums to the fund, the timely filing of payroll reports and the maintenance of an adequate premium deposit. If the applicant is delinquent or defaulted, or has been terminated, then the permit shall not be issued until the applicant returns to compliance or is restored by the workers' compensation division under a reinstatement agreement: Provided, That in all such inquiries the commissioner of the bureau of employment programs shall make response to the division of environmental protection within fifteen calendar days, otherwise failure to respond timely shall be considered to indicate the applicant is in compliance and such failure will not be used to preclude issuance of the permit.

(B) It is a requirement of this article that each operator maintain continued compliance with the provisions of section five, article two, chapter twenty-three of this code and provide proof of compliance to the director on an annual basis. (1994, c. 61; 1995, c. 253.)

Effect of amendment of 1995. — The amendment, effective February 10, 1995, rewrote (6).

Applied in State ex rel. W. Va. Highlands Conservancy, Inc. v. West Virginia Div. of Envtl. Protection, 191 W. Va. 719, 447 S.E.2d 920 (1994).

§ 22-3-9. Permit application requirements and contents.

Applied in State ex rel. W. Va. Highlands Conservancy, Inc. v. West Virginia Div. of Envtl. Protection, 191 W. Va. 719, 447 S.E.2d 920 (1994).

§ 22-3-11. Bonds; amount and method of bonding; bonding requirements; special reclamation tax and fund; prohibited acts; period of bond liability.

Use of special reclamation fund.

Pursuant to subsection (g) and 38 W. Va. C.S.R. § 2-12.4(d), the West Virginia Division of Environmental Protection has a mandatory, nondiscretionary duty to utilize moneys from the Special Reclamation Fund, up to 25% of the annual amount, to treat acid mine drainage at bond forfeiture sites when the proceeds from forfeited bonds are less than the actual cost of reclamation. However, when the cost of treating acid mine drainage at these sites is greater than the amount of funds available in the Special Reclamation Fund, the Division of Environmental Protection may expend the available funds in the Special Reclamation Fund at the highest priority sites. State ex rel. W. Va. Highlands Conservancy, Inc. v. West Virginia Div. of Envtl. Protection, 191 W. Va. 719, 447 S.E.2d 920 (1994).

Stated in Cat Run Coal Co. v. Babbitt, 912 F. Supp. 772 (S.D.W. Va. 1996).

§ 22-3-13. General environmental protection performance standards for surface-mining; variances.

(a) Any permit issued by the director pursuant to this article to conduct surface-mining operations shall require that the surface-mining operations will meet all applicable performance standards of this article and other requirements as the director promulgates.

(b) The following general performance standards are applicable to all surface mines and require the operation, at a minimum to:

(1) Maximize the utilization and conservation of the solid fuel resource being recovered to minimize reaffecting the land in the future through surface-mining;

(2) Restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood so long as the use or uses do not present any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution, and the permit applicants' declared proposed land use following reclamation is not deemed to be impractical or unreasonable, inconsistent with applicable land use policies and plans, involves unreasonable delay in implementation, or is violative of federal, state or local law;

(3) Except as provided in subsection (c) of this section, with respect to all surface mines, backfill, compact where advisable to ensure stability or to prevent leaching of toxic materials, and grade in order to restore the approximate original contour: Provided, That in surface-mining which is carried out at the same location over a substantial period of time where the operation transects the coal deposit, and the thickness of the coal deposits relative to the volume of the overburden is large and where the operator demonstrates that the overburden and other spoil and waste materials at a particular point in the permit area or otherwise available from the entire permit area is insufficient, giving due consideration to volumetric expansion, to restore the approximate original contour, the operator, at a minimum, shall backfill, grade and compact, where advisable, using all available overburden and other spoil and waste materials to attain the lowest practicable grade, but not more than the angle of repose, to provide adequate drainage and to cover all acid-forming and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region: Provided, however, That in surface-mining where the volume of overburden is large relative to the thickness of the coal deposit and where the operator demonstrates that due to volumetric expansion the amount of overburden and other spoil and waste materials removed in the course of the mining operation is more than sufficient to restore the approximate original contour, the operator shall, after restoring the approximate contour, backfill, grade and compact, where advisable, the excess overburden and other spoil and waste materials to attain the lowest grade, but not more than the angle of repose, and to cover all acid-forming and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region and, the overburden or spoil shall be shaped and graded in such a way as to prevent slides, erosion and water pollution and is revegetated in accordance with the requirements of this article: Provided further, That the director shall promulgate rules governing variances to the requirements for return to approximate original contour or highwall elimination and where adequate material is not available from surface-mining operations permitted after the effective date of this article for: (A) Underground mining operations existing prior to the third day of August, one

thousand nine hundred seventy-seven; or (B) for areas upon which surface-mining prior to the first day of July, one thousand nine hundred seventy-seven, created highwalls;

(4) Stabilize and protect all surface areas, including spoil piles, affected by the surface-mining operation to effectively control erosion and attendant air and water pollution;

(5) Remove the topsoil from the land in a separate layer, replace it on the backfill area, or if not utilized immediately, segregate it in a separate pile from other spoil and, when the topsoil is not replaced on a backfill area within a time short enough to avoid deterioration of the topsoil, maintain a successful vegetative cover by quick growing plants or by other similar means in order to protect topsoil from wind and water erosion and keep it free of any contamination by other acid or toxic material: Provided, That if topsoil is of insufficient quantity or of poor quality for sustaining vegetation, or if other strata can be shown to be more suitable for vegetation requirements, then the operator shall remove, segregate and preserve in a like manner such other strata which is best able to support vegetation;

(6) Restore the topsoil or the best available subsoil which is best able to support vegetation;

(7) Ensure that all prime farmlands are mined and reclaimed in accordance with the specifications for soil removal, storage, replacement and reconstruction established by the United States secretary of agriculture and the soil conservation service pertaining thereto. The operator, at a minimum, shall be required to: (A) Segregate the A horizon of the natural soil, except where it can be shown that other available soil materials will create a final soil having a greater productive capacity, and if not utilized immediately, stockpile this material separately from other spoil, and provide needed protection from wind and water erosion or contamination by other acid or toxic material; (B) segregate the B horizon of the natural soil, or underlying C horizons or other strata, or a combination of such horizons or other strata that are shown to be both texturally and chemically suitable for plant growth and that can be shown to be equally or more favorable for plant growth than the B horizon, in sufficient quantities to create in the regraded final soil a root zone of comparable depth and quality to that which existed in the natural soil, and if not utilized immediately, stockpile this material separately from other spoil and provide needed protection from wind and water erosion or contamination by other acid or toxic material; (C) replace and regrade the root zone material described in subparagraph (B) above with proper compaction and uniform depth over the regraded spoil material; and (D) redistribute and grade in a uniform manner the surface soil horizon described in subparagraph (A) above;

(8) Create, if authorized in the approved surface-mining and reclamation plan and permit, permanent impoundments of water on mining sites as part of reclamation activities in accordance with rules promulgated by the director;

(9) Where augering is the method of recovery, seal all auger holes with an impervious and noncombustible material in order to prevent drainage except where the director determines that the resulting impoundment of water in such auger holes may create a hazard to the environment or the public welfare

and safety: Provided, That the director may prohibit augering if necessary to maximize the utilization, recoverability or conservation of the mineral resources or to protect against adverse water quality impacts;

(10) Minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated off-site areas and to the quality and quantity of water in surface and groundwater systems both during and after surface-mining operations and during reclamation by: (A) Avoiding acid or other toxic mine drainage by such measures as, but not limited to: (i) Preventing or removing water from contact with toxic producing deposits; (ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses; and (iii) casing, sealing or otherwise managing boreholes, shafts and wells and keep acid or other toxic drainage from entering ground and surface waters; (B) conducting surface-mining operations so as to prevent to the extent possible, using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area, but in no event shall contributions be in excess of requirements set by applicable state or federal law; (C) constructing an approved drainage system pursuant to subparagraph (B) of this subdivision prior to commencement of surface-mining operations, such system to be certified by a person approved by the director to be constructed as designed and as approved in the reclamation plan; (D) avoiding channel deepening or enlargement in operations requiring the discharge of water from mines; (E) unless otherwise authorized by the director, cleaning out and removing temporary or large settling ponds or other siltation structures after disturbed areas are revegetated and stabilized, and depositing the silt and debris at a site and in a manner approved by the director; (F) restoring recharge capacity of the mined area to approximate premining conditions; and (G) such other actions as the director may prescribe;

(11) With respect to surface disposal of mine wastes, tailings, coal processing wastes and other wastes in areas other than the mine working excavations, stabilize all waste piles in designated areas through construction in compacted layers, including the use of noncombustible and impervious materials if necessary, and assure the final contour of the waste pile will be compatible with natural surroundings and that the site will be stabilized and revegetated according to the provisions of this article;

(12) Design, locate, construct, operate, maintain, enlarge, modify and remove or abandon, in accordance with standards and criteria developed pursuant to subsection (f) of this section, all existing and new coal mine waste piles consisting of mine wastes, tailings, coal processing wastes or other liquid and solid wastes, and used either temporarily or permanently as dams or embankments;

(13) Refrain from surface-mining within five hundred feet of any active and abandoned underground mines in order to prevent breakthroughs and to protect health or safety of miners: Provided, That the director shall permit an operator to mine near, through or partially through an abandoned underground mine or closer to an active underground mine if: (A) The nature, timing and sequencing of the approximate coincidence of specific surface mine

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activities with specific underground mine activities are coordinated jointly by the operators involved and approved by the director; and (B) such operations will result in improved resource recovery, abatement of water pollution or elimination of hazards to the health and safety of the public: Provided, however, That any breakthrough which does occur shall be sealed;

(14) Ensure that all debris, acid-forming materials, toxic materials or materials constituting a fire hazard are treated or buried and compacted, or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters, and that contingency plans are developed to prevent sustained combustion: Provided, That the operator shall remove or bury all metal, lumber, equipment and other debris resulting from the operation before grading release;

(15) Ensure that explosives are used only in accordance with existing state and federal law and the rules promulgated by the director, which shall include provisions to: (A) Provide adequate advance written notice to local governments and residents who might be affected by the use of the explosives by publication of the planned blasting schedule in a newspaper of general circulation in the locality and by mailing a copy of the proposed blasting schedule to every resident living within one-half mile of the proposed blasting site: Provided, That this notice shall suffice as daily notice to residents or occupants of the areas; (B) maintain for a period of at least three years and make available for public inspection, upon written request, a log detailing the location of the blasts, the pattern and depth of the drill holes, the amount of explosives used per hole and the order and length of delay in the blasts; (C) limit the type of explosives and detonating equipment, the size, the timing and frequency of blasts based upon the physical conditions of the site so as to prevent: (i) Injury to persons; (ii) damage to public and private property outside the permit area; (iii) adverse impacts on any underground mine; and (iv) change in the course, channel or availability of ground or surface water outside the permit area; (D) require that all blasting operations be conducted by persons certified by the director; and (E) provide that upon written request of a resident or owner of a man-made dwelling or structure within one-half mile of any portion of the permit area, the applicant or permittee shall conduct a preblasting survey or other appropriate investigation of the structures and submit the results to the director and a copy to the resident or owner making the request. The area of the survey shall be determined by the director in accordance with rules promulgated by him or her;

(16) Ensure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with the surface-mining operations. Time limits shall be established by the director requiring backfilling, grading and planting to be kept current: Provided, That where surface-mining operations and underground mining operations are proposed on the same area, which operations must be conducted under separate permits, the director may grant a variance from the requirement that reclamation efforts proceed as contemporaneously as practicable to permit underground mining operations prior to reclamation:

(A) If the director finds in writing that:

(i) The applicant has presented, as part of the permit application, specific, feasible plans for the proposed underground mining operations;

(ii) The proposed underground mining operations are necessary or desirable to assure maximum practical recovery of the mineral resource and will avoid multiple disturbance of the surface;

(iii) The applicant has satisfactorily demonstrated that the plan for the underground mining operations conforms to requirements for underground mining in the jurisdiction and that permits necessary for the underground mining operations have been issued by the appropriate authority;

(iv) The areas proposed for the variance have been shown by the applicant to be necessary for the implementing of the proposed underground mining operations;

(v) No substantial adverse environmental damage, either on-site or off-site, will result from the delay in completion of reclamation as required by this article; and

(vi) Provisions for the off-site storage of spoil will comply with subdivision (22), subsection (b) of this section;

(B) If the director has promulgated specific rules to govern the granting of such variances in accordance with the provisions of this subparagraph and has imposed such additional requirements as the director deems necessary;

(C) If variances granted under the provisions of this paragraph are reviewed by the director not more than three years from the date of issuance of the permit: Provided, That the underground mining permit shall terminate if the underground operations have not commenced within three years of the date the permit was issued, unless extended as set forth in subdivision (3), section eight [§ 22-3-8(3)] of this article; and

(D) If liability under the bond filed by the applicant with the director pursuant to subsection (b), section eleven [§ 22-3-11(b)] of this article is for the duration of the underground mining operations and until the requirements of subsection (g), section eleven [§ 22-3-11(g)] and section twenty-three [§ 22-3-23] of this article have been fully complied with.

(17) Ensure that the construction, maintenance and postmining conditions of access and haulroads into and across the site of operations will control or prevent erosion and siltation, pollution of water, damage to fish or wildlife or their habitat, or public or private property: Provided, That access roads constructed for and used to provide infrequent service to surface facilities, such as ventilators or monitoring devices, are exempt from specific construction criteria provided adequate stabilization to control erosion is achieved through alternative measures;

(18) Refrain from the construction of roads or other access ways up a stream bed or drainage channel or in proximity to the channel so as to significantly alter the normal flow of water;

(19) Establish on the regraded areas, and all other lands affected, a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area of land to be affected or of a fruit, grape or berry producing variety suitable for human consumption and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the

area, except that introduced species may be used in the revegetation process where desirable or when necessary to achieve the approved postmining land use plan;

(20) Assume the responsibility for successful revegetation, as required by subdivision (19) of this subsection, for a period of not less than five growing seasons, as defined by the director, after the last year of augmented seeding, fertilizing, irrigation or other work in order to assure compliance with subdivision (19) of this subsection: Provided, That when the director issues a written finding approving a long-term agricultural postmining land use as a part of the mining and reclamation plan, the director may grant exception to the provisions of subdivision (19) of this subsection: Provided, however, That when the director approves an agricultural postmining land use, the applicable five growing seasons of responsibility for revegetation begins on the date of initial planting for such agricultural postmining land use;

On lands eligible for remining assume the responsibility for successful revegetation, as required by subdivision (19) of this subsection, for a period of not less than two growing seasons, as defined by the director after the last year of augmented seeding, fertilizing, irrigation or other work in order to assure compliance with subdivision (19) of this subsection.

(21) Protect off-site areas from slides or damage occurring during surface-mining operations and not deposit spoil material or locate any part of the operations or waste accumulations outside the permit area: Provided, That spoil material may be placed outside the permit area, if approved by the director after a finding that environmental benefits will result from such;

(22) Place all excess spoil material resulting from surface-mining activities in such a manner that: (A) Spoil is transported and placed in a controlled manner in position for concurrent compaction and in a way as to assure mass stability and to prevent mass movement; (B) the areas of disposal are within the bonded permit areas and all organic matter is removed immediately prior to spoil placements; (C) appropriate surface and internal drainage system or diversion ditches are used to prevent spoil erosion and movement; (D) the disposal area does not contain springs, natural water courses or wet weather seeps, unless lateral drains are constructed from the wet areas to the main underdrains in a manner that filtration of the water into the spoil pile will be prevented; (E) if placed on a slope, the spoil is placed upon the most moderate slope among those upon which, in the judgment of the director, the spoil could be placed in compliance with all the requirements of this article, and is placed, where possible, upon, or above, a natural terrace, bench or berm, if placement provides additional stability and prevents mass movement; (F) where the toe of the spoil rests on a downslope, a rock toe buttress, of sufficient size to prevent mass movement, is constructed; (G) the final configuration is compatible with the natural drainage pattern and surroundings and suitable for intended uses; (H) design of the spoil disposal area is certified by a qualified registered professional engineer in conformance with professional standards; and (I) all other provisions of this article are met: Provided, That where the excess spoil material consists of at least eighty percent, by volume, sandstone, limestone or other rocks that do not slake in water and will not degrade to soil

material, the director may approve alternate methods for disposal of excess spoil material, including fill placement by dumping in a single lift, on a site specific basis: Provided, however, That the services of a qualified registered professional engineer experienced in the design and construction of earth and rockfill embankment are utilized: Provided further, That such approval may not be unreasonably withheld if the site is suitable;

(23) Meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this article, taking into consideration the physical, climatological and other characteristics of the site;

(24) To the extent possible, using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife and related environmental values, and achieve enhancement of these resources where practicable; and

(25) Retain a natural barrier to inhibit slides and erosion on permit areas where outcrop barriers are required: Provided, That constructed barriers may be allowed where: (A) Natural barriers do not provide adequate stability; (B) natural barriers would result in potential future water quality deterioration; and (C) natural barriers would conflict with the goal of maximum utilization of the mineral resource: Provided, however, That at a minimum, the constructed barrier must be of sufficient width and height to provide adequate stability and the stability factor must equal or exceed that of the natural outcrop barrier: Provided further, That where water quality is paramount, the constructed barrier must be composed of impervious material with controlled discharge points.

(c) (1) The director may prescribe procedures pursuant to which he or she may permit surface-mining operations for the purposes set forth in subdivision (3) of this subsection.

(2) Where an applicant meets the requirements of subdivisions (3) and (4) of this subsection, a permit without regard to the requirement to restore to approximate original contour set forth in subsection (b) or (d) of this section may be granted for the surface-mining of coal where the mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge or hill, except as provided in subparagraph (A), subdivision (4) of this subsection, by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining, and capable of supporting postmining uses in accordance with the requirements of this subsection.

(3) In cases where an industrial, commercial, woodland, agricultural, residential, public or fish and wildlife habitat and recreation lands use is proposed for the postmining use of the affected land, the director may grant a permit for a surface-mining operation of the nature described in subdivision (2) of this subsection where: (A) The proposed postmining land use is deemed to constitute an equal or better use of the affected land, as compared with premining use; (B) the applicant presents specific plans for the proposed postmining land use and appropriate assurances that the use will be: (i) Compatible with adjacent land uses; (ii) practicable with respect to achieving the proposed use; (iii) supported by commitments from public agencies where appropriate; (iv)

practicable with respect to private financial capability for completion of the proposed use; (v) planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use; and (vi) designed by a person approved by the director in conformance with standards established to assure the stability, drainage and configuration necessary for the intended use of the site; (C) the proposed use would be compatible with adjacent land uses, and existing state and local land use plans and programs; (D) the director provides the county commission of the county in which the land is located and any state or federal agency which the director, in his or her discretion, determines to have an interest in the proposed use, an opportunity of not more than sixty days to review and comment on the proposed use; and (E) all other requirements of this article will be met.

(4) In granting any permit pursuant to this subsection, the director shall require that: (A) A natural barrier be retained to inhibit slides and erosion on permit areas where outcrop barriers are required: Provided, That constructed barriers may be allowed where: (i) Natural barriers do not provide adequate stability; (ii) natural barriers would result in potential future water quality deterioration; and (iii) natural barriers would conflict with the goal of maximum utilization of the mineral resource: Provided, however, That, at a minimum, the constructed barrier must be sufficient width and height to provide adequate stability and the stability factor must equal or exceed that of the natural outcrop barrier: Provided further, That where water quality is paramount, the constructed barrier must be composed of impervious material with controlled discharge points; (B) the reclaimed area is stable; (C) the resulting plateau or rolling contour drains inward from the outslopes except at specific points; (D) no damage will be done to natural watercourses; (E) spoil will be placed on the mountaintop bench as is necessary to achieve the planned postmining land use: And provided further, That all excess spoil material not retained on the mountaintop shall be placed in accordance with the provisions of subdivision (22), subsection (b) of this section; and (F) ensure stability of the spoil retained on the mountaintop and meet the other requirements of this article.

(5) All permits granted under the provisions of this subsection shall be reviewed not more than three years from the date of issuance of the permit; unless the applicant affirmatively demonstrates that the proposed development is proceeding in accordance with the terms of the approved schedule and reclamation plan.

(d) In addition to those general performance standards required by this section, when surface-mining occurs on slopes of twenty degrees or greater, or on such lesser slopes as may be defined by rule after consideration of soil and climate, no debris, abandoned or disabled equipment, spoil material or waste mineral matter will be placed on the natural downslope below the initial bench or mining cut: Provided, That soil or spoil material from the initial cut of earth in a new surface-mining operation may be placed on a limited specified area of the downslope below the initial cut if the permittee can establish to the satisfaction of the director that the soil or spoil will not slide and that the other requirements of this section can still be met.

(e) The director may promulgate rules that permit variances from the approximate original contour requirements of this section: Provided, That the watershed control of the area is improved: Provided, however, That complete backfilling with spoil material is required to completely cover the highwall, which material will maintain stability following mining and reclamation.

(f) The director shall promulgate rules for the design, location, construction, maintenance, operation, enlargement, modification, removal and abandonment of new and existing coal mine waste piles. In addition to engineering and other technical specifications, the standards and criteria developed pursuant to this subsection must include provisions for review and approval of plans and specifications prior to construction, enlargement, modification, removal or abandonment; performance of periodic inspections during construction; issuance of certificates of approval upon completion of construction; performance of periodic safety inspections; and issuance of notices and orders for required remedial or maintenance work or affirmative action: Provided, That whenever the director finds that any coal processing waste pile constitutes an imminent danger to human life, he or she may, in addition to all other remedies and without the necessity of obtaining the permission of any person prior or present who operated or operates a pile or the landowners involved, enter upon the premises where any such coal processing waste pile exists and may take or order to be taken such remedial action as may be necessary or expedient to secure the coal processing waste pile and to abate the conditions which cause the danger to human life: Provided, however, That the cost reasonably incurred in any remedial action taken by the director under this subsection may be paid for initially by funds appropriated to the division for these purposes, and the sums so expended shall be recovered from any responsible operator or landowner, individually or jointly, by suit initiated by the attorney general at the request of the director. For purposes of this subsection "operates" or "operated" means to enter upon a coal processing waste pile, or part thereof, for the purpose of disposing, depositing, dumping coal processing wastes thereon or removing coal processing waste therefrom, or to employ a coal processing waste pile for retarding the flow of or for the impoundment of water. (1994, c. 61; 1997, c. 133.)

Effect of amendment of 1997. — The amendment, in (b)(3), substituted "the" for "such" preceding "overburden or spoil" in the second proviso; in (b)(22), substituted "may" for "shall" in the last proviso; and, in (c)(3), inserted "fish and wildlife habitat and recreation lands" in the first sentence.

Editor's notes. — Concerning the reference in (b)(3) to "the effective date of this article," Acts 1994, c. 61, which revised this article, passed March 12, 1994 and became effective ninety days from passage. Acts 1997, c. 133, which amended this section, passed April 12, 1997 and became effective ninety days from passage

§ 22-3-14. General environmental protection performance standards for the surface effects of underground mining; application of other provisions of article to surface effects of underground mining.

Correction required. — Pursuant to this section and 30 U.S.C. § 1266, the operator of an underground mine is required to correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence. Rose v. Oneida Coal Co., 195 W. Va. 736, 466 S.E.2d 794 (1995).

Waiver of right to restoration. — There is nothing in this section nor in 30 U.S.C. § 1266 that allows a landowner to waive the statutory right to restoration of surface lands. Rose v. Oneida Coal Co., 195 W. Va. 736, 466 S.E.2d 794 (1995).

§ 22-3-15. Inspections; monitoring; right of entry; inspection of records; identification signs; progress maps.

(a) The director shall cause to be made inspections of surface-mining operations as are necessary to effectively enforce the requirements of this article and for such purposes the director or his or her authorized representative shall without advance notice and upon presentation of appropriate credentials: (A) Have the right of entry to, upon or through surface-mining operations or any premises in which any records required to be maintained under subdivision (1), subsection (b) of this section are located; and (B) at reasonable times and without delay, have access to and copy any records and inspect any monitoring equipment or method of operation required under this article.

(b) For the purpose of enforcement under this article, in the administration and enforcement of any permit under this article, or for determining whether any person is in violation of any requirement of this article:

(1) The director shall, at a minimum, require any operator to: (A) Establish and maintain appropriate records; (B) make monthly reports to the division; (C) install, use and maintain any necessary monitoring equipment or methods consistent with subdivision (11), subsection (a), section nine [§ 22-3-9(a)(11)] of this article; (D) evaluate results in accordance with such methods, at such locations, intervals and in such manner as the director prescribes; and (E) provide any other information relative to surface-mining operations as the director finds reasonable and necessary; and

(2) For those surface-mining operations which remove or disturb strata that serve as aquifers which significantly ensure the hydrologic balance of water use either on or off the mining site, the director shall require that: (A) Monitoring sites be established to record the quantity and quality of surface drainage above and below the mine site as well as in the potential zone of influence; (B) monitoring sites be established to record level, amount and samples of groundwater and aquifers potentially affected by the surface-mining and also below the lowermost mineral seam to be mined; (C) records or

well logs and borehole data be maintained; and (D) monitoring sites be established to record precipitation. The monitoring, data collection and analysis required by this section shall be conducted according to standards and procedures set forth by the director in order to assure their reliability and validity.

(c) All surface-mining operations shall be inspected at least once every thirty days. The inspections shall be made on an irregular basis without prior notice to the operator or the operator's agents or employees, except for necessary on-site meetings with the operator. The inspections shall include the filing of inspection reports adequate to enforce the requirements, terms and purposes of this article.

(d) Each permittee shall maintain at the entrances to the surface-mining operations a clearly visible monument which sets forth the name, business address and telephone number of the permittee and the permit number of the surface-mining operations.

(e) Copies of any records, reports, inspection materials or information obtained under this article by the director shall be made immediately available to the public at central and sufficient locations in the county, multicounty or state area of mining so that they are conveniently available to residents in the areas of mining unless specifically exempted by this article.

(f) Within thirty days after service of a copy of an order of the director upon an operator by registered or certified mail, the operator shall furnish to the director five copies of a progress map prepared by or under the supervision of a person approved by the director showing the disturbed area to the date of such map. Such progress map shall contain information identical to that required for both the proposed and final maps required by this article, and shall show in detail completed reclamation work as required by the director. Such progress map shall include a geologic survey sketch showing the location of the operation, shall be properly referenced to a permanent landmark, and shall be within such reasonable degree of accuracy as may be prescribed by the director. If no land has been disturbed by operations during the preceding year, the operator shall notify the director of that fact.

(g) Whenever on the basis of available information, including reliable information from any person, the director has cause to believe that any person is in violation of this article, any permit condition or any rule promulgated under this article, the director shall immediately order state inspection of the surface-mining operation at which the alleged violation is occurring unless the information is available as a result of a prior state inspection. The director shall notify any person who supplied such reliable information when the state inspection will be carried out. Such person may accompany the inspector during the inspection.

(h) When requested by the permittee, the director may provide for a compliance conference with his or her authorized representative to review the compliance status of any coal exploration or surface-coal mining and reclamation operation. Any such conference may not constitute an inspection as defined in this section. (1994, c. 61, 1997, c. 133.)

Effect of amendment of 1997. — The amendment, in (b)(2), made a punctuation change; in (c), substituted "The" for "Such" in the second sentence; and added (h).

§ 22-3-17. Notice of violation; procedure and actions; enforcement; permit revocation and bond forfeiture; civil and criminal penalties; appeals to the board; prosecution; injunctive relief.

(a) If any of the requirements of this article, rules promulgated pursuant thereto or permit conditions have not been complied with, the director shall cause a notice of violation to be served upon the operator or the operator's duly authorized agent. A copy of the notice shall be handed to the operator or the operator's duly authorized agent in person or served by certified mail addressed to the operator at the permanent address shown on the application for a permit. The notice shall specify in what respects the operator has failed to comply with this article, rules or permit conditions and shall specify a reasonable time for abatement of the violation not to exceed thirty days. If the operator has not abated the violation within the time specified in the notice, or any reasonable extension thereof, not to exceed sixty days, the director shall order the cessation of the operation or the portion thereof causing the violation, unless the operator affirmatively demonstrates that compliance is unattainable due to conditions totally beyond the control of the operator. If a violation is not abated within the time specified or any extension thereof, or any cessation order is issued, a mandatory civil penalty of not less than seven hundred fifty dollars per day per violation shall be assessed. A cessation order remains in effect until the director determines that the violation has been abated or until modified, vacated or terminated by the director or by a court. In any cessation order issued under this subsection, the director shall determine the steps necessary to abate the violation in the most expeditious manner possible and shall include the necessary measures in the order.

(b) If the director determines that a pattern of violations of any requirement of this article or any permit condition exists or has existed, as a result of the operator's lack of reasonable care and diligence, or that the violations are willfully caused by the operator, the director shall immediately issue an order directing the operator to show cause why the permit should not be suspended or revoked and giving the operator thirty days in which to request a public hearing. If a hearing is requested, the director shall inform all interested parties of the time and place of the hearing. Any hearing under this section shall be recorded and is subject to the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code. Within sixty days following the public hearing, the director shall issue and furnish to the permittee and all other parties to the hearing a written decision, and the reasons therefor, concerning suspension or revocation of the permit. Upon the operator's failure to show cause why the permit should not be suspended or revoked, the director shall immediately suspend or revoke the operator's permit. If the permit is revoked, the director shall initiate procedures in accordance with rules promulgated by the director to forfeit the entire amount of the operator's bond, or other security posted

pursuant to section eleven or twelve [§ 22-3-11 or § 22-3-12] of this article, and give notice to the attorney general, who shall collect the forfeiture without delay: Provided, That the entire proceeds of such forfeiture shall be deposited with the treasurer of the state of West Virginia to the credit of the special reclamation fund. All forfeitures collected shall be deposited in the special reclamation fund and shall be expended back upon the areas for which the bond was posted: Provided, however, That any excess therefrom shall remain in the special reclamation fund.

Within one year following the notice of permit revocation, subject to the discretion of the director and based upon a petition for reinstatement, the revoked permit may be reinstated. The reinstated permit may be assigned to any person who meets the permit eligibility requirements of this article.

(c) Any person engaged in surface-mining operations who violates any permit condition or who violates any other provision of this article or rules promulgated pursuant thereto may also be assessed a civil penalty. The penalty may not exceed five thousand dollars. Each day of continuing violation may be deemed a separate violation for purposes of penalty assessments. In determining the amount of the penalty, consideration shall be given to the operator's history of previous violations at the particular surface-mining operation, the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public, whether the operator was negligent, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of the violation.

(d) (1) Upon the issuance of a notice or order pursuant to this section, the assessment officer shall, within thirty days, set a proposed penalty assessment and notify the operator in writing of such proposed penalty assessment. The proposed penalty assessment must be paid in full within thirty days of receipt or, if the operator wishes to contest either the amount of the penalty or the fact of violation, an informal conference with the assessment officer may be requested within fifteen days or a formal hearing before the surface mine board may be requested within thirty days. The notice of proposed penalty assessment shall advise the operator of the right to an informal conference and a formal hearing pursuant to this section. When an informal conference is requested, the operator has fifteen days from receipt of the assessment officer's decision to request a formal hearing before the board.

(A) When an informal conference is held, the assessment officer has authority to affirm, modify or vacate the notice, order or proposed penalty assessment.

(B) When a formal hearing is requested, the amount of the proposed penalty assessment shall be forwarded to the director for placement in an escrow account. Formal hearings shall be of record and subject to the provisions of article five [§ 29A-5-1 et seq.], chapter twenty-nine-a of this code. Following the hearing the board shall affirm, modify or vacate the notice, order or proposed penalty assessment and, when appropriate, incorporate an assessment order requiring that the assessment be paid.

(2) Civil penalties owed under this section may be recovered by the director in the circuit court of Kanawha County. Civil penalties collected under this

article shall be deposited with the treasurer of the state of West Virginia to the credit of the special reclamation fund established in section eleven [§ 22-3-11] of this article. If, through the administrative or judicial review of the proposed penalty it is determined that no violation occurred or that the amount of the penalty should be reduced, the director shall within thirty days remit the appropriate amount to the person, with interest at the rate of six percent or at the prevailing United States department of the treasury rate, whichever is greater. Failure to forward the money to the director within thirty days is a waiver of all legal rights to contest the violation or the amount of the penalty.

(e) Any person having an interest which is or may be adversely affected by any order of the director or the surface mine board may file an appeal only in accordance with the provisions of article one [§ 22B-1-1 et seq.], chapter twenty-two-b of this code, within thirty days after receipt of the order.

(f) The filing of an appeal or a request for an informal conference or formal hearing provided for in this section does not stay execution of the order appealed from. Pending completion of the investigation and conference or hearing required by this section, the applicant may file with the director a written request that the director grant temporary relief from any notice or order issued under section sixteen or seventeen [§ 22-3-16 or § 22-3-17] of this article, together with a detailed statement giving reasons for granting such relief. The director shall issue an order or decision granting or denying such relief expeditiously: Provided, That where the applicant requests relief from an order for cessation of surface-mining and reclamation operations, the decision on the request shall be issued within five days of its receipt. The director may grant such relief, under such conditions as he or she may prescribe if:

(1) All parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;

(2) The person requesting the relief shows that there is a substantial likelihood that they will prevail on the merits in the final determination of the proceedings;

(3) The relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air or water resources; and

(4) The relief sought is not the issuance of a permit where a permit has been denied, in whole or in part, by the director.

(g) Any person who willfully and knowingly violates a condition of a permit issued pursuant to this article or rules promulgated pursuant thereto, or fails or refuses to comply with any order issued under said article and rules or any order incorporated in a final decision issued by the director, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than ten thousand dollars, or imprisoned in the county jail not more than one year, or both fined and imprisoned.

(h) Whenever a corporate operator violates a condition of a permit issued pursuant to this article, rules promulgated pursuant thereto, or any order incorporated in a final decision issued by the director, any director, officer or agent of the corporation who willfully and knowingly authorized, ordered or carried out the failure or refusal, is subject to the same civil penalties, fines and imprisonment that may be imposed upon a person under subsections (c) and (g) of this section.

(i) Any person who knowingly makes any false statement, representation or certification, or knowingly fails to make any statement, representation or certification in any application, petition, record, report, plan or other document filed or required to be maintained pursuant to this article or rules promulgated pursuant thereto, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than ten thousand dollars, or imprisoned in the county jail not more than one year, or both fined and imprisoned.

(j) Whenever any person: (A) Violates or fails or refuses to comply with any order or decision issued by the director under this article; or (B) interferes with, hinders or delays the director in carrying out the provisions of this article; or (C) refuses to admit the director to the mine; or (D) refuses to permit inspection of the mine by the director; or (E) refuses to furnish any reasonable information or report requested by the director in furtherance of the provisions of this article; or (F) refuses to permit access to, and copying of, such records as the director determines necessary in carrying out the provisions of this article; or (G) violates any other provisions of this article, the rules promulgated pursuant thereto, or the terms and conditions of any permit, the director, the attorney general or the prosecuting attorney of the county in which the major portion of the permit area is located may institute a civil action for relief, including a permanent or temporary injunction, restraining order or any other appropriate order, in the circuit court of Kanawha County or any court of competent jurisdiction to compel compliance with and enjoin such violations, failures or refusals. The court or the judge thereof may issue a preliminary injunction in any case pending a decision on the merits of any application filed without requiring the filing of a bond or other equivalent security.

(k) Any person who, except as permitted by law, willfully resists, prevents, impedes or interferes with the director or any of his or her agents in the performance of duties pursuant to this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than one year, or both. (1994, c. 61; 1997, c. 133.)

Effect of amendment of 1997. — The amendment added the final sentence in (b).

§ 22-3-18. Approval, denial, revision and prohibition of permit.

(a) Upon the receipt of a complete surface-mining application or significant revision or renewal thereof, including public notification and an opportunity for a public hearing, the director shall grant, require revision of, or deny the application for a permit within sixty days and notify the applicant in writing of the decision. The applicant for a permit, or revision of a permit, has the burden of establishing that the application is in compliance with all the requirements of this article and the rules promulgated hereunder.

(b) No permit or significant revision of a permit may be approved unless the applicant affirmatively demonstrates and the director finds in writing on the

basis of the information set forth in the application or from information otherwise available which shall be documented in the approval and made available to the applicant that:

(1) The permit application is accurate and complete and that all the requirements of this article and rules thereunder have been complied with;

(2) The applicant has demonstrated that reclamation as required by this article can be accomplished under the reclamation plan contained in the permit application;

(3) The assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance, as specified in section nine [§ 22-3-9] of this article, has been made by the director and the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area;

(4) The area proposed to be mined is not included within an area designated unsuitable for surface-mining pursuant to section twenty-two [§ 22-3-22] of this article or is not within an area under administrative study by the director for such designation; and

(5) In cases where the private mineral estate has been severed from the private surface estate, the applicant has submitted: (A) The written consent of the surface owner to the extraction of coal by surface-mining; or (B) a conveyance that expressly grants or reserves the right to extract the coal by surface-mining; or (C) if the conveyance does not expressly grant the right to extract coal by surface-mining, the surface subsurface legal relationship shall be determined in accordance with applicable law: Provided, That nothing in this article shall be construed to authorize the director to adjudicate property rights disputes.

(c) Where information available to the division indicates that any surface-mining operation owned or controlled by the applicant is currently in violation of this article or other environmental laws or rules, the permit may not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the director or the department or agency which has jurisdiction over the violation, and no permit may be issued to any applicant after a finding by the director, after an opportunity for hearing, that the applicant or the operator specified in the application controls or has controlled mining operations with a demonstrated pattern of willful violations of this article or of other state or federal programs implementing the federal Surface-Mining Control and Reclamation Act of 1977, as amended, of such nature and duration with such irreparable damage to the environment as to indicate an intent not to comply with the provisions of this article or the federal Surface-Mining Control and Reclamation Act of 1977, as amended: Provided, That if the director finds that the applicant is or has been affiliated with, or managed or controlled by, or is or has been under the common control of, other than as an employee, a person who has had a surface-mining permit revoked or bond or other security forfeited for failure to reclaim lands as required by the laws of this state, he or she may not issue a permit to the applicant: Provided, however, That subject to the discretion of the director and based upon a petition for reinstatement, permits may be issued to

any applicant if: (1) After the revocation or forfeiture, the operator whose permit has been revoked or bond forfeited has paid into the special reclamation fund any additional sum of money determined by the director to be adequate to reclaim the disturbed area; (2) the violations which resulted in the revocation or forfeiture have not caused irreparable damage to the environment; and (3) the director is satisfied that the petitioner will comply with this article.

(d) (1) In addition to finding the application in compliance with subsection (b) of this section, if the area proposed to be mined contains prime farmland, the director may, pursuant to rules promulgated hereunder, grant a permit to mine on prime farmland if the operator affirmatively demonstrates that the operator has the technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as nonmined prime farmland in the surrounding area under equivalent levels of management, and can meet the soil reconstruction standards in subdivision (7), subsection (b), section thirteen [§ 22-3-13(b)(7)] of this article. Except for compliance with subsection (b) of this section, the requirements of this subdivision apply to all permits issued after the third day of August, one thousand nine hundred seventy-seven.

(2) Nothing in this subsection applies to any permit issued prior to the third day of August, one thousand nine hundred seventy-seven, or to any revisions or renewals thereof, or to any existing surface-mining operations for which a permit was issued prior to said date.

(e) If the director finds that the overburden on any part of the area of land described in the application for a permit is such that experience in the state with a similar type of operation upon land with similar overburden shows that one or more of the following conditions cannot feasibly be prevented: (1) Substantial deposition of sediment in stream beds; (2) landslides; or (3) acid-water pollution, the director may delete such part of the land described in the application upon which such overburden exists.

(f) The prohibition of subsection (c) of this section may not apply to a permit application due to any violation resulting from an unanticipated event or condition at a surface coal mine eligible for remining under a permit held by the applicant. (1994, c. 61; 1997, c. 133.)

Effect of amendment of 1997. — The amendment, in (c), substituted "may" for "shall" following "the permit" in the first sentence and following "he or she" near the end of the first proviso; added (f); and made punctuation changes.

§ 22-3-24. Water rights and replacement; waiver of replacement.

Applicability. — Neither this section nor its federal counterpart in 30 U.S.C. § 1307 is applicable to the operation of an underground coal mine. Rose v. Oneida Coal Co., 195 W. Va. 736, 466 S.E.2d 794 (1995).

§ 22-3-25. Citizen suits; order of court; damages.

Quoted in Rose v. Oneida Coal Co., 195 W. Va. 736, 466 S.E.2d 794 (1995).

§ 22-3-28. Special permits authorization for reclamation of existing abandoned coal processing waste piles; coal extraction pursuant to a government-financed reclamation contract; coal extraction as an incidental part of development of land for commercial, residential, industrial or civic use; no cost reclamation contract.

(a) Except where exempted by section twenty-six [§ 22-3-26] of this article, it is unlawful for any person to engage in surface-mining as defined in this article as an incident to the development of land for commercial, residential, industrial or civic use without having first obtained from the director a permit therefor as provided in section eight [§ 22-3-8] of this article, unless a special authorization therefor has been first obtained from the director as provided in this section.

Application for a special authorization to engage in surface-mining as an incident to the development of land for commercial, residential, industrial or civic use shall be made in writing on forms prescribed by the director and shall be signed and verified by the applicant. The application shall be accompanied by:

(1) A site preparation plan, prepared and certified by or under the supervision of a person approved by the director, showing the tract of land which the applicant proposes to develop for commercial, residential, industrial or civic use; the probable boundaries and areas of the coal deposit to be mined and removed from said tract of land incident to the proposed commercial, residential, industrial or civic use thereof; and such other information as prescribed by the director;

(2) A development plan for the proposed commercial, residential, industrial or civic use of said land;

(3) The name of owner of the surface of the land to be developed;

(4) The name of owner of the coal to be mined incident to the development of the land;

(5) A reasonable estimate of the number of acres of coal that would be mined as a result of the proposed development of said land: Provided, That in no event may such number of acres to be mined, excluding roadways, exceed five acres; and

(6) Such other information as the director may require to satisfy and assure the director that the surface-mining under special authorization is incidental or secondary to the proposed commercial, residential, industrial or civic use of said land.

(b) There shall be attached to the application for the special authorization a certificate of insurance certifying that the applicant has in force a public

liability insurance policy issued by an insurance company authorized to do business in this state affording personal injury protection in accordance with subsection (d), section nine [§ 22-3-9(d)] of this article.

The application for the special authorization shall also be accompanied by a bond, or cash or collateral securities or certificates of the same type, in the form as prescribed by the director and in the minimum amount of two thousand dollars per acre, for a maximum disturbance of five acres.

The bond shall be payable to the state of West Virginia and conditioned that the applicant complete the site preparation for the proposed commercial, residential, industrial or civic use of said land. At the conclusion of the site preparation, in accordance with the site preparation plan submitted with the application, the bond conditions are satisfied and the bond and any cash, securities or certificates furnished with said bond may be released and returned to the applicant. The filing fee for the special authorization is five hundred dollars. The special authorization is valid for two years.

(c) The purpose of this section is to vest jurisdiction in the director, where the surface-mining is incidental or secondary to the preparation of land for commercial, residential, industrial or civic use and where, as an incident to such preparation of land, minerals must be removed, including, but not limited to, the building and construction of railroads, shopping malls, factory and industrial sites, residential and building sites and recreational areas. Anyone who has been issued a special authorization may not be issued an additional special authorization on the same or adjacent tract of land unless satisfactory evidence has been submitted to the director that such authorization is necessary to subsequent development or construction. As long as the operator complies with the purpose and provisions of this section, the other sections of this article are not applicable to the operator holding a special authorization: Provided, That the director shall promulgate rules establishing applicable performance standards for operations permitted under this section.

(d) The director may, in the exercise of his or her sound discretion, when not in conflict with the purposes and findings of this article and to bring about a more desirable land use or to protect the public and the environment, issue a reclamation contract solely for the removal of existing abandoned coal processing waste piles: Provided, That a bond and a reclamation plan is required for such operations.

(e) No person may engage in coal extraction pursuant to a government-financed reclamation contract without a valid surface-mining permit issued pursuant to this article unless such person affirmatively demonstrates that he is eligible to secure special authorization pursuant to this section to engage in a government-financed reclamation contract authorizing incidental and necessary coal extraction. The director shall determine eligibility before entering into a government-financed reclamation contract authorizing incidental and necessary coal extraction. The director may provide the special authorization as part of the government-financed reclamation contract: Provided, That the contract contains and does not violate the requirements of this section. The director may not be required to grant a special authorization to any eligible person. The director may, however, in his or her discretion, grant a special

authorization allowing incidental and necessary coal extraction pursuant to a government-financed reclamation contract in accordance with this section.

Only eligible persons may secure special authorization to engage in incidental and necessary coal extraction pursuant to a government-financed reclamation contract. Any eligible person who proposes to engage in coal extraction pursuant to a government-financed reclamation contract may request and secure special authorization from the director to conduct such activities under this section. A special authorization can only be obtained if a clause is inserted in a government-financed reclamation contract authorizing such extraction and the person requesting such authorization has affirmatively demonstrated to the director's satisfaction that he or she has satisfied the provisions of this section. A special authorization shall only be granted by the director prior to the commencement of coal extraction on a project area. In order to be considered for a special authorization by the director, an eligible person must meet the permit eligibility requirements of this article and demonstrate at a minimum that:

(1) The primary purpose of the operation to be undertaken is the reclamation of abandoned or forfeited mine lands;

(2) The extraction of coal will be incidental and necessary to accomplish the reclamation of abandoned or forfeited mine lands pursuant to a government-financed reclamation contract;

(3) Incidental and necessary coal extraction will be confined to the project area being reclaimed; or

(4) All coal extraction and reclamation activity undertaken pursuant to a government-financed reclamation project will be accomplished pursuant to the applicable environmental protection performance standards and conditions included in the government-financed reclamation contract.

Prior to commencing coal extraction pursuant to a government-financed reclamation project, the contractor shall file with the director a performance bond conditioned upon the contractor's performance of all the requirements of the government-financed reclamation contract pursuant to this article. For a no cost reclamation contract, the criteria for establishing the amount of the performance bond shall be the engineering estimate, determined by the director: Provided, That the director may establish a lesser bond amount for long term, no cost reclamation projects in which the reclamation schedule extends beyond two years. In these contracts, the director may in the alternative establish a bond amount which reflects the cost of the proportionate amount of reclamation which will occur during a specified period. The performance bond which is provided by the contractor under a federally financed or state financed reclamation contract shall be deemed to satisfy the requirements of this section: Provided, however, That the amount of such bond is equivalent to or greater than the amount determined by the criteria set forth in this subsection.

(f) Any person engaging in coal extraction pursuant to this section is subject to the following:

(1) Payment of all applicable taxes and fees related to coal extraction;

(2) Replacement or restoration of the water supply of an owner of interest in real property who obtains all or part of the owner's supply of water for

domestic, agricultural, industrial or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution or interruption proximately caused by coal extraction;

(3) Extraction pursuant to this section cannot be initiated without the consent of the surface owner for right of entry and consent of the mineral owner for extraction of coal. (1994, c. 61; 1997, c. 133.)

Effect of amendment of 1997. — The amendment substituted "authorization" for "permit" throughout; in (b), substituted "for two years" for "until work permitted is completed" at the end; in (c), substituted "may" for "shall" following "authorization"; in (d), substituted "reclamation contract" for "special permit" and deleted "The director shall promulgate specific rules for such operations" preceding the proviso; added (e) and (f); and made punctuation changes.

ARTICLE 4.

SURFACE MINING AND RECLAMATION OF MINERALS OTHER THAN COAL.

Sec.
22-4-11. Blasting restriction; formula; filing preplan; penalties; notice.

§ 22-4-11. Blasting restriction; formula; filing preplan; penalties; notice.

Where blasting of overburden or mineral is necessary, the blasting shall be done in accordance with established principles for preventing injury to persons and damage to residences, buildings and communities. The blasting is in compliance with provisions of this article if the following measures are adhered to:

(1) The weight in pounds of explosives to be detonated in any period less than an eight millisecond period without seismic monitoring shall conform to the following scaled distance formula: W = (D/50) (to the second power). Where W equals weight in pounds of explosives detonated at any one instant time, then D equals distance in feet from nearest point of blast to nearest residence, building or structure, other than operation facilities of the mine: Provided, That the scaled distance formulas need not be used if a seismograph measurement at or between the blast site and the nearest protected structure (residence, building or structure) is recorded and maintained for every blast. The peak particle velocity in inches per second in any one of the three mutually perpendicular directions shall not exceed the following values at any protected structure:

Seismograph Measurement	Distance to the Nearest Protected Structure
1.25	0-300 feet
1.00	301-5,000 feet
0.75	5,001 feet or greater

The maximum ground vibration standards do not apply to the structures owned by the permittee and not leased to another person and structures owned by the permittee and leased to another person, if a written waiver by the lessee is submitted to the director before blasting.

(2) Airblast shall not exceed the maximum limits listed below at the location of any dwelling, public buildings, school or community or institutional building outside the permit area:

Lower frequency limit of measuring system in Hz(+3dB)	Maximum level in db
1Hz or lower-flat response*	134 peak
2Hz or lower-flat response	133 peak
6Hz or lower-flat response	129 peak
c-weighted-slow response*	105 peak dBC

*only when approved by the director.

(3) Access to the blast area shall be controlled against the entrance of unauthorized personnel during blasting for a period thereafter until an authorized person has reasonably determined that:

(A) No unusual circumstances exist such as imminent slides or undetonated charges, etc.; and

(B) Access to and travel in or through the area can be safely resumed.

(4) A plan of each operation's methods for compliance with this section (blast delay design) for typical blasts which shall be adhered to in all blasting at each operation, shall be submitted to the division of environmental protection with the application for a permit. It shall be accepted if it meets the scaled distance formula established in subdivision (1) of this section.

(5) Records of each blast shall be kept in a log to be maintained for at least three years, which will show for each blast the following information:

(A) Date and time of blast;

(B) Number of holes;

(C) Typical explosive weight per delay period;

(D) Total explosives in blast at any one time;

(E) Number of delays used;

(F) Weather conditions;

(G) Signature of operator employee in charge of the blast;

(H) Seismograph data; and

(I) Date of seismograph calibration.

(6) Where inspection by the division of environmental protection establishes that the scaled distance formula or the seismograph results or the approved preplan are not being adhered to, the following penalties shall be imposed:

(A) For the first offense in any one permit year under this section, the permit holder shall be assessed not less than five hundred dollars nor more than one thousand dollars;

(B) For the second offense in any one permit year under this section, the permit holder shall be assessed not less than one thousand dollars nor more than five thousand dollars;

(C) For the third offense in any one permit year under this section or for the failure to pay any assessment hereinabove set forth within a reasonable time established by the commissioner, the permit shall be revoked.

All assessments as set forth in this section shall be assessed by the director, collected by the director and deposited with the treasurer of the state of West Virginia, to the credit of the operating permit fees fund.

The director shall propose legislative rules pursuant to article three [§ 29A-3-1 et seq.], chapter twenty-nine-a of this code which shall provide for a warning of impending blasting to the owners, residents or other persons who may be present on property adjacent to the blasting area. (1994, c. 61; 1996, c. 177.)

Effect of amendment of 1996. — The amendment rewrote the introductory paragraph, (1), and (2); inserted present (3), redesignating the remaining subdivisions accordingly; substituted "the division of environmental protection" for "the director" in present (4) and in the introductory paragraph in (6); corrected the capitalization of the subdivision designations in present (5) and (6); in present (5), deleted "other than secondary (boulder-breaking) blasts" following "for each blast," made punctuation changes, and added (H) and (I); in the introductory paragraph in (6), substituted "or the seismograph results or the approved preplan" for "and the approved preplan"; in (6)(C), substituted "the commissioner" for "the director"; in the next-to-last paragraph, substituted "the director" for "him or her"; and, in the last paragraph, substituted "propose legislative rules pursuant to article three, chapter twenty-nine-a of this code which" for "shall promulgate rules a [sic] which."

ARTICLE 5.

AIR POLLUTION CONTROL.

Sec.
22-5-17. Interstate ozone transport.

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

Solid waste construction permits. — A person who obtains a construction permit from the division of environmental protection under this section to construct a medical waste incinerator is not required to also obtain a construction permit for that purpose under § 22-15-10. State ex rel. East End Ass'n v. McCoy, 481 S.E.2d 764 (W. Va. 1996).

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

Quoted in State ex rel. East End Ass'n v. McCoy, 481 S.E.2d 764 (W. Va. 1996).

§ 22-5-13. Consolidation of permits.

Quoted in State ex rel. East End Ass'n v. McCoy, 481 S.E.2d 764 (W. Va. 1996).

§ 22-5-14. Administrative review of permit actions.

Quoted in State ex rel. East End Ass'n v. McCoy, 481 S.E.2d 764 (W. Va. 1996).

§ 22-5-17. Interstate ozone transport.

(a) This section of the Air Pollution Control Act may be referred to as the Interstate Ozone Transport Oversight Act.

(b) The Legislature hereby finds that:

(1) The federal Clean Air Act, as amended, contains a comprehensive regulatory scheme for the control of emissions from mobile and stationary sources, which will improve ambient air quality and health and welfare in all parts of the nation.

(2) The number of areas unable to meet national ambient air quality standards for ozone has been declining steadily and will continue to decline with air quality improvements resulting from implementation of the federal Clean Air Act amendments of 1990, and the mobile and stationary source emission controls specified therein.

(3) Scientific research on the transport of atmospheric ozone across state boundaries is proceeding under the auspices of the United States environmental protection agency (U.S. EPA), state agencies, and private entities, which research will lead to improved scientific understanding of the causes and nature of ozone transport, and emission control strategies potentially applicable thereto.

(4) The northeast ozone transport commission established by the federal Clean Air Act amendments of 1990 has proposed emission control requirements for stationary and mobile sources in certain northeastern states and the District of Columbia in addition to those specified by the federal Clean Air Act amendments of 1990.

(5) Membership of the northeast ozone transport commission includes, by statute, representatives of state environmental agencies and governors' offices; similar representation is required in the case of other ozone transport commissions established by the Administrator of the United States environmental protection agency pursuant to Section 176A of the federal Clean Air Act, as amended.

(6) The northeast ozone transport commission neither sought nor obtained state legislative oversight or approval prior to reaching its decisions on mobile and stationary source requirements for states included within the northeast ozone transport region.

(7) The Commonwealth of Virginia and other parties have challenged the constitutionality of the northeast ozone transport commission and its regulatory proposals under the guarantee, compact, and joinder clauses of the United States Constitution.

(8) The United States environmental protection agency, acting outside of the aforementioned statutory requirements for the establishment of new interstate transport commissions, is encouraging the state of West Virginia and twenty-four other states outside of the northeast to participate in multistate

negotiations through the ozone transport assessment group; such negotiations are intended to provide the basis for an interstate memorandum of understanding or other agreement on ozone transport requiring reductions of emissions of nitrogen oxides or volatile organic compounds in addition to those specified by the federal Clean Air Act amendments of 1990, membership of the ozone transport assessment group consists of state and federal air quality officials, without state legislative representation or participation by the governor.

(9) Emission control requirements exceeding those specified by federal law can adversely affect state economic development, competitiveness, employment, and income without corresponding environmental benefits; in the case of electric utility emissions of nitrogen oxides, it is estimated that control costs in addition to those specified by the federal Clean Air Act could exceed five billion dollars annually in a thirty-seven state region of the eastern United States, including the state of West Virginia.

(10) Requiring certain eastern states to meet emission control requirements more stringent than those otherwise applicable to other states and unnecessary for environmental protection would unfairly affect interstate competition for new industrial development and employment opportunities.

(c) It is therefore directed that:

(1) Not later than ten days subsequent to the receipt by the director of the division of environmental protection of any proposed memorandum of understanding or other agreement by the ozone transport assessment group, or similar group, potentially requiring the state of West Virginia to undertake emission reductions in addition to those specified by the federal Clean Air Act, the director of the division of environmental protection shall submit such proposed memorandum or other agreement to the president of the Senate and the speaker of the House of Delegates for consideration.

(2) Upon receipt of the aforesaid memorandum of understanding or agreement, the President and the Speaker shall refer the understanding or agreement to one or more appropriate legislative committees with a request that such committees convene one or more public hearings to receive comments from agencies of government and other interested parties on its prospective economic and environmental impacts on the state of West Virginia and its citizens, including impacts on energy use, taxes, economic development, utility costs and rates, competitiveness and employment.

(3) Upon completion of the public hearings required by the preceding subdivision, the committees(s) shall forward to the president and the speaker a report containing its findings and recommendations concerning any proposed memorandum of understanding or other agreement related to the interstate transport of ozone. The report shall make findings with respect to the economic, health, safety and welfare and environmental impacts on the state of West Virginia and its citizens, including impacts on energy use, taxes, economic development, utility costs and rates, competitiveness and employment.

(4) Upon receipt of the report required by the preceding subdivision, the president and speaker shall thereafter transmit the report to the governor for such further consideration or action as may be warranted.

(5) Nothing in this section shall be construed to preclude the Legislature from taking such other action with respect to any proposed memorandum of understanding or other agreement related to the interstate transport of ozone as it deems appropriate.

(6) No person is authorized to commit the state of West Virginia to the terms of any such memorandum or agreement unless specifically approved by an act of the Legislature. (1996, c. 202.)

ARTICLE 6.

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

W. Va. Law Review. — Lane, "Fire in the Hole to Longwall Shears: Old Law Applied to New Technology and Other Longwall Mining Issues," 96 W. Va. L. Rev. 577 (1994).

§ 22-6-34. Offenses; penalties.

Cited in CSX Transp. Inc. v. PKV Ltd. Partnership, 906 F. Supp. 339 (S.D.W. Va. 1995).

ARTICLE 7.

OIL AND GAS PRODUCTION DAMAGE COMPENSATION.

§ 22-7-1. Legislative findings and purpose.

Private cause of action. — Private cause of action for violation of 38 W. Va. C.S.R. §§ 18-5.6 and 18-16.3, promulgated pursuant to this section for the benefit of surface landowners may only be maintained where plaintiff is a member of the class for whose benefits the statute or regulation was enacted. CSX Transp. Inc. v. PKV Ltd. Partnership, 906 F. Supp. 339 (S.D.W. Va. 1995).

§ 22-7-2. Definitions.

Quoted in CSX Transp. Inc. v. PKV Ltd. Partnership, 906 F. Supp. 339 (S.D.W. Va. 1995).

§ 22-7-8. Application of article.

Private cause of action. — Private causes of action may be implied from legislative rules to the same extent that such causes of action arise from statutory authorization. CSX Transp. Inc. v. PKV Ltd. Partnership, 906 F. Supp. 339 (S.D.W. Va. 1995).

ARTICLE 10.

ABANDONED WELL ACT.

W. Va. Law Review. — Lane, "Fire in the Hole to Longwall Shears: Old Law Applied to New Technology and Other Longwall Mining Issues," 96 W. Va. L. Rev. 577 (1994).

ARTICLE 11.

WATER POLLUTION CONTROL ACT.

§ 22-11-1. Short title.

Cited in Cat Run Coal Co. v. Babbitt, 932 F. Supp. 772 (S.D.W. Va. 1996).

ARTICLE 15.

SOLID WASTE MANAGEMENT ACT.

§ 22-15-2. Definitions.

Noninfectious medical waste. — Solid waste includes noninfectious medical waste. State ex rel. East End Ass'n v. McCoy, 481 S.E.2d 764 (W. Va. 1996).

Medical waste incinerator. — A medical waste incinerator, including the area around it where solid waste was stored and handled prior to incineration, was a solid waste facility and was, therefore, governed by the Solid Waste Management Act. State ex rel. East End Ass'n v. McCoy, 481 S.E.2d 764 (W. Va. 1996).

Cited in State ex rel. Hamrick v. LCS Servs., Inc., 193 W. Va. 111, 454 S.E.2d 405 (1994).

§ 22-15-5. Powers and duties; rules and rule making.

Quoted in State ex rel. East End Ass'n v. McCoy, 481 S.E.2d 764 (W. Va. 1996).

§ 22-15-10. Prohibitions; permits required; priority of disposal.

Solid waste construction permits. — A person who obtains a construction permit from the division of environmental protection under § 22-5-11 to construct a medical waste incinerator is not required to also obtain a construction permit for that purpose under this section. State ex rel. East End Ass'n v. McCoy, 481 S.E.2d 764 (W. Va. 1996).

Medical waste. — Medical center was required to obtain a permit prior to operating its solid waste facility, including its new incinerator. State ex rel. East End Ass'n v. McCoy, 481 S.E.2d 764 (W. Va. 1996).

§ 22-15-11. Solid waste assessment fee; penalties.

Cited in Wetzel County Solid Waste Auth. v. West Virginia Div. of Natural Resources, 195 W. Va. 1, 462 S.E.2d 349 (1995).

§ 22-15-17. Limited extension of solid waste facility closure deadline.

Cited in State ex rel. Hamrick v. LCS Servs., Inc., 193 W. Va. 111, 454 S.E.2d 405 (1994).

ARTICLE 16.

SOLID WASTE LANDFILL CLOSURE ASSISTANCE PROGRAM.

§ 22-16-9. Solid waste closure revenue bonds lawful investments.

Editor's notes. — Former § 12-6-9, referred to in this section, concerned loans to the state, purpose for which moneys transferred could be disbursed and expended, terms and conditions for repayment, and the creation of a special account in the state treasury, and was repealed by Acts 1996, c. 258. For new law see § 44-6B-1 et seq.

§ 22-16-10. Limitation on assistance.

The director may provide closure assistance only to permittees who meet the following requirements:

(1) The permittee of a landfill that does not have a liner and ceases accepting solid waste on or before the thirtieth day of November, one thousand nine hundred ninety-one, except for those landfills allowed to accept solid waste pursuant to the provisions of section seventeen [§ 22-15-17], article fifteen of this chapter and ceases accepting solid waste on or before the extension deadline as determined by the director; or the permittee of a landfill that has only a single liner and ceases accepting solid waste on or before the thirtieth day of September, one thousand nine hundred ninety-three;

(2) The permittee of the landfill must demonstrate to the satisfaction of the director that it does not have the financial resources on hand or the ability to generate the amounts needed to comply, in a timely manner, with the closure requirements provided in article fifteen [§ 22-15-1 et seq.] of this chapter and any rules promulgated pursuant thereto: Provided, That any permittee required to close a landfill, or any portion thereof, due to the lack of an approved composite liner system, who collects solid waste within this state which is disposed outside this state, shall not be eligible for closure assistance: Provided, however, That any permittee which is a Class I municipality shall be eligible for closure assistance when the permittee elects to and pays the solid waste assessment fee which would otherwise be levied and imposed upon the disposal of the solid waste by subsection (a), section four [§ 22-16-4(a)] of this article, if the solid waste was disposed of within the state; and

(3) The permittee must maintain a permit for the landfill pursuant to the provisions of section ten [§ 22-15-10], article fifteen of this chapter and

maintain the full amount of the bond required to be submitted pursuant to section twelve [§ 22-15-12] of said article. (1994, c. 61; 1994, 1st Ex. Sess., c. 31; 1995, c. 104.)

Effect of amendment of 1995. — The amendment, effective March 11, 1995, rewrote (2) following the first proviso; and substituted "section twelve of said article" for "section twelve, article fifteen of this chapter" at the end of (3).

§ 22-16-12. Solid waste facility closure cost assistance fund; closure extension; reporting requirements.

(a) The "closure cost assistance fund" is continued as a special revenue account in the state treasury. The fund shall operate as a special fund whereby all deposits and payments thereto do not expire to the general revenue fund, but shall remain in such account and be available for expenditure in the succeeding fiscal year. Separate subaccounts may be established within the special account for the purpose of identification of various revenue resources and payment of specific obligations.

(b) Interest earned on any money in the fund shall be deposited to the credit of the fund.

(c) The fund consists of the following:

(1) Moneys collected and deposited in the state treasury which are specifically designated by acts of the Legislature for inclusion in the fund, including moneys collected and deposited into the fund pursuant to section four [§ 22-16-4] of this article;

(2) Contributions, grants and gifts from any source, both public and private, which may be used by the director for any project or projects;

(3) Amounts repaid by permittees pursuant to section eighteen [§ 22-15-18], article fifteen of this chapter; and

(4) All interest earned on investments made by the state from moneys deposited in this fund.

(d) The solid waste management board, upon written approval of the director, has the authority to pledge all or such part of the revenues paid into the closure cost assistance fund as may be needed to meet the requirements of any revenue bond issue or issues of the solid waste management board authorized by this article, including the payment of principal of, interest and redemption premium, if any, on such revenue bonds and the establishing and maintaining of a reserve fund or funds for the payment of the principal of, interest and redemption premium, if any, on such revenue bond issue or issues when other moneys pledged may be insufficient therefor. Any pledge of moneys in the closure cost assistance fund for revenue bonds shall be a prior and superior charge on such fund over the use of any of the moneys in such fund to pay for the cost of any project on a cash basis. Expenditures from the fund, other than for the retirement of revenue bonds, may only be made in accordance with the provisions of this article.

(e) The amounts deposited in the fund may be expended only on the cost of projects as provided for in sections three and fifteen of this article [§§ 22-16-3

and 22-16-15], as provided in subsection (f) of this section and for payment of bonds and notes issued pursuant to section five [§ 22-16-5] of this article: Provided, That no more than two percent of the annual deposits to such fund may be used for administrative purposes.

(f) Notwithstanding any provision of this article, upon request of the solid waste management board, and with the approval of the projects by the director of the division of environmental protection, the director may pledge and place into escrow accounts up to an aggregate of two million dollars of the fund to satisfy two years debt service requirement that permittees of publicly-owned landfills and transfer stations are required to meet in order to obtain loans. Pledges shall be made on a project-by-project basis, may not exceed five hundred thousand dollars for a project and shall be made available after loan commitments are received. The director may pledge funds for a loan only when the following conditions are met:

(1) The proceeds of the loan are used only to perform construction of a transfer station or a composite liner system that is required to meet the provisions of title forty-seven, series thirty-eight, solid waste management rules;

(2) The permittee dedicates all yearly debt service revenue, as determined by the public service commission, to meet the repayment schedule of the loan, before it uses available revenue for any other purpose; and

(3) That any funds pledged may only be paid to the lender if the permittee is in default on the loan.

(g) Any landfills which were ordered to close by the thirty-first day of December, one thousand nine hundred ninety-four, and which have been granted a certificate of need pursuant to the provisions of subsection (b), section one-c [§ 24-2-1c(b)], article two, chapter twenty-four of this code or section one-i [§ 24-2-1i] of said article are hereby granted a closure extension until the first day of January, one thousand nine hundred ninety-six: Provided, That no landfill which closed on or before the thirtieth day of September, one thousand nine hundred ninety-four, shall be eligible for such an extension.

(h) The department of environmental protection is required to file, by the first day of January of each ensuing year, an annual report with the joint committee on government and finance providing details on the manner in which the landfill closure assistance funds were expended for the prior fiscal year. (1994, c. 61; 1994, 1st Ex. Sess., c. 31; 1995, c. 104.)

Effect of amendment of 1995. — The amendment, effective March 11, 1995, substituted "two percent" for "one percent" in (e); and added (g) and (h).

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-nine pursuant to article ten [§ 4-10-1 et seq.], chapter four of this code. (1994, c. 61; 1997, c. 191.)

Effect of amendment of 1997. — The amendment, effective July 1, 1997, in the last sentence, substituted "one thousand nine hundred ninety-nine" for "one thousand nine hundred ninety-seven," and deleted "to allow for the completion of a preliminary performance review pursuant to article ten, chapter four of this code" from the end.

ARTICLE 21.

COALBED METHANE WELLS AND UNITS.

W. Va. Law Review. — "Subjacent Support: A Right Afforded to Surface Estates Alone?" 97 W. Va. L. Rev. 1111 (1995).

§ 22-21-2. Definitions.

W. Va. Law Review. — Lewin, "Coalbed Methane: Recent Court Decisions Leave Ownership 'Up in the Air.' But New Federal and State Legislation Should Facilitate Production," 96 W. Va. L. Rev. 631 (1994).

§ 22-21-3. Application of article; exclusions; application of chapter twenty-two-b to coalbed methane wells.

W. Va. Law Review. — Lewin, "Coalbed Methane: Recent Court Decisions Leave Ownership 'Up in the Air.' But New Federal and State Legislation Should Facilitate Production," 96 W. Va. L. Rev. 631 (1994).

§ 22-21-13. Review board hearing; findings; order.

W. Va. Law Review. — Lewin, "Coalbed Methane: Recent Court Decisions Leave Ownership 'Up in the Air,' But New Federal and State Legislation Should Facilitate Production," 96 W. Va. L. Rev. 631 (1994).

§ 22-21-20. Spacing.

W. Va. Law Review. — Lewin, "Coalbed Methane: Recent Court Decisions Leave Ownership 'Up in the Air,' But New Federal and State Legislation Should Facilitate Production," 96 W. Va. L. Rev. 631 (1994).

§ 22-21-22. Notice of plugging and reclamation of well; right to take well; objection; plugging order; plugging for minethrough.

W. Va. Law Review. — Lewin, "Coalbed Methane: Recent Court Decisions Leave Ownership 'Up in the Air,' But New Federal and State Legislation Should Facilitate Production," 96 W. Va. L. Rev. 631 (1994).

ARTICLE 22.

VOLUNTARY REMEDIATION AND REDEVELOPMENT ACT.

Effective dates. — Acts 1996, c. 92, provided that the act take effect July 1, 1996.

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

(a) The Legislature finds there is property in West Virginia that is not being put to its highest productive use because it is contaminated or it is perceived to be contaminated as a result of past activity on the property.

(b) The Legislature further finds that abandonment or under use of contaminated or potentially contaminated industrial sites results in inefficient use of public facilities and services and increases the pressure for development of uncontaminated pristine land. Since existing industrial areas frequently have transportation networks, utilities and an existing infrastructure, it can be less costly to society to redevelop existing industrial areas than to relocate amenities for industrial areas at pristine sites.

(c) The Legislature further finds that the existing legal structure creates uncertainty regarding the legal effect of remediation upon liability. Legal uncertainty serves as a further disincentive to productive redevelopment of brownfields. Therefore, incentives should be put in place to encourage voluntary redevelopment of contaminated or potentially contaminated sites.

(d) The Legislature further finds that an administrative program should be established to encourage persons to voluntarily develop and implement remedial plans without the need for enforcement action by the division of environmental protection. Therefore, it is the purpose of this article to:

(1) Establish an administrative program to facilitate voluntary remediation activities and brownfield revitalization;

(2) Provide financial incentives to entice investment at brownfield sites; and

(3) Establish limitations on liability under environmental laws and rules for those persons who remediate sites in accordance with applicable standards established under this article. (1996, c. 92.)

§ 22-22-2. Definitions.

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

(a) "Applicable standards", mean the remediation levels established in or pursuant to section three [§ 22-22-3] of this article;

(b) "Brownfield" means any industrial or commercial property which is abandoned or not being actively used by the owner as of the effective date of this article, but shall not include any site subject to a unilateral enforcement order under § 104 through § 106 of the "Comprehensive Environmental Response, Compensation and Liability Act", 94 Stat. 2779, 42 U.S.C. § 9601, as amended, or which has been listed or proposed to be listed by the United States environmental protection agency on the priorities list of Title I of said act, or subject to a unilateral enforcement order under § 3008 and § 7003 of the "Resource Conservation Recovery Act" or any unilateral enforcement order for corrective action under this chapter;

(c) "Certified laboratory" means any laboratory approved by the director under laboratory certification rules adopted pursuant to section fifteen [§ 22-1-15], article one of this chapter;

(d) "Contaminant" or "contamination" means any man made or man induced alteration of the chemical, physical or biological integrity of soils, sediments, air and surface water or groundwater resulting from activities regulated under this article, in excess of applicable standards in this chapter, including any hazardous substance, petroleum, or natural gas;

(e) "Controls" means to apply engineering measures, such as capping or treatment, or institutional measures, such as deed restrictions, to contaminated sites;

(f) "Development authority" means any authority as defined in article twelve, chapter seven [§ 7-12-1 et seq.] of this code or the state development office as defined in article two [§ 5B-2-1 et seq.], chapter five-b of this code.

(g) "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 this article;

(h) "Division" means the division of environmental protection of the state of West Virginia;

(i) "Engineering controls" means remedial actions directed exclusively toward containing or controlling the migration of contaminants through the environment. These include, but are not limited to, slurry walls, liner systems, caps, leachate collection systems and groundwater recovery trenches;

(j) "Hazardous substance" means any substance identified as a hazardous substance pursuant to the "Comprehensive Environmental Response, Compensation and Liability Act", 94 Stat. 2779, 42 U.S.C. § 9601, as amended;

(k) "Institutional controls" means legal or contractual restrictions on property use that remain effective after the remediation action is completed and are used to meet applicable standards. The term may include, but is not limited to, deed and water use restrictions;

(l) "Industrial activity" means commercial, manufacturing, public utility, mining or any other activity done to further either the development, manufacturing or distribution of goods and services, intermediate and final products and solid waste created during such activities, including, but not limited to, administration of business activities, research and development, warehousing, shipping, transport, remanufacturing, stockpiling of raw materials, storage, repair and maintenance of commercial machinery or equipment and solid waste management;

(m) "Land-use covenant" means a document or deed restriction issued by the director on remediated sites which have attained and demonstrate continuing compliance with site-specific standards for any contaminants at the site. The covenant shall be recorded by deed in the office of the county clerk of the county wherein the site is situated. The document or covenant shall be included by any grantor or lessor in any deed or other instrument of conveyance or any lease or other instrument whereby real property is let for a period of one year or more, as more fully set forth in sections thirteen and fourteen [§§ 22-22-13 and 22-22-14] of this article;

(n) "Licensed remediation specialist" means a person certified by the director pursuant to rules adopted under section three of this article as qualified to perform professional services and to supervise the remediation of contaminated sites;

(o) "Mitigation measure" means any remediation action performed by a person prior to or during implementation of a remediation plan to protect human health and the environment;

(p) "Natural gas" means natural gas, natural gas liquids, liquefied natural gas, coalbed methane, synthetic gas usable for fuel or mixtures of natural gas and synthetic gas;

(q) "Nonresidential property" means any real property on which commercial, industrial, manufacturing or any other activity is done to further the development, manufacturing or distribution of goods and services, intermediate and final business activities, research and development, warehousing, shipping, transport, remanufacturing, stockpiling of raw materials, storage, repair and maintenance of commercial machinery and equipment, and solid waste management. This term shall not include schools, day care centers, nursing homes, or other residential-style facilities or recreational areas;

(r) "Owner" means any person owning or holding legal or equitable title or possessory interest in property or, where title or control of property was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to this state or a political subdivision of this state, or any person who owned the property before the conveyance;

(s) "Operator" means the person responsible for the overall operation of a facility site;

(t) "Person" 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; state of West Virginia; governmental agency, including federal facilities; political subdivision; county commission; municipal corporation; partnership; trust; estate; person or individuals acting individually or as a group; or any legal entity whatever;

(u) "Petroleum" means oil or petroleum of any kind and in any form, including, without limitation, crude oil or any fraction thereof, oil sludge, oil refuse, used oil, substances or additives in the refining or blending of crude petroleum or petroleum stock;

(v) "Practical quantitation level" means the lowest analytical level that can be reliably achieved within specified limits of precision and accuracy under routine laboratory conditions for a specified matrix. It is based on quantitation, precision and accuracy under normal operation of a laboratory and the practical need in a compliance-monitoring program to have a sufficient number of laboratories available to conduct the analyses;

(w) "Property" means any parcel of real property, and any improvements thereof;

(x) "Related" means the persons who are related to the third degree of consanguinity or marriage;

(y) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, migrating, dumping or

disposing of any contaminant or regulated substance into the environment, including, without limitation, the abandonment or improper discarding of barrels, containers or any other closed receptacle containing any contaminant;

(z) "Remediation" means to cleanup, mitigate, correct, abate, minimize, eliminate, control and contain or prevent a release of a contaminant into the environment in order to protect the present or future public health, safety, welfare, or the environment, including preliminary actions to study or assess the release;

(aa) "Remediation contractor" means any person who enters into and is carrying out a contract to cleanup, remediate, respond to or remove a release or threatened release of a contaminant and includes any person who the contractor retained or hired to provide services under a remediation contract;

(bb) "Residential" means any real property or portion thereof which is designed for the housing of human beings and does not meet the definition of "nonresidential" property set forth above;

(cc) "Risk" means the probability that a contaminant, when released into the environment, will cause an adverse effect in exposed humans or other living organisms;

(dd) "Site" means any property or portion thereof which contains or may contain contaminants and is eligible for remediation as provided under this article;

(ee) "Unilateral enforcement order" means a written final order issued by a federal or state agency charged with enforcing environmental law, which compels the fulfillment of an obligation imposed by law, rule against a person without their voluntary consent; and

(ff) "Voluntary remediation" means a series of measures that may be self-initiated by a person to identify and address potential sources of contamination of property and to establish that the property complies with applicable remediation standards. (1996, c. 92.)

Editor's notes.— Concerning the reference in (b) to "the effective date of this article," Acts 1996, c. 92, which enacted this article, provided that the act take effect July 1, 1996.

§ 22-22-3. Rule-making authority of the director.

Within one year after the effective date of this section, the director, in accordance with chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code, shall propose, and subsequently may amend, suspend or rescind, rules that do the following:

(a) Establish an administrative program for both brownfield revitalization and voluntary remediation including application procedures;

(b) Establish procedures for the licensure of remediation specialists, including, but not limited to establishing licensing fees, testing procedures, disciplinary procedures and methods for revocation of licenses;

(c) Establish procedures for community notification and involvement;

(d) Establish risk-based standards for remediation;

(e) Establish standards for the remediation of property;

(f) Establish a risk protocol for conducting risk assessments and establishing risk-based standards. The risk protocol shall:

(1) Require consideration of existing and reasonably anticipated future human exposures based on current and reasonably anticipated future land and water uses and significant adverse effects to ecological receptor health and viability;

(2) Include, at a minimum, both central tendency and reasonable upper bound estimates of exposure;

(3) Require risk assessments to consider, to the extent practicable, the range of probabilities of risks actually occurring, the range or size of populations likely to be exposed to risk, and quantitative and qualitative descriptions of uncertainties;

(4) Establish criteria for what constitutes appropriate sources of toxicity information;

(5) Address the use of probabilistic modeling;

(6) Establish criteria for what constitutes appropriate criteria for the selection and application of fate and transport models;

(7) Address the use of population risk estimates in addition to individual risk estimates;

(8) To the extent deemed appropriate and feasible by the director considering available scientific information, define appropriate approaches for addressing cumulative risks posed by multiple contaminants or multiple exposure pathways;

(9) Establish appropriate sampling approaches and data quality requirements; and

(10) This protocol shall include public notification and involvement provisions so that the public can understand how remediation standards are applied to a site and provide for clear communication of site risk issues, including key risk assessment assumptions, uncertainties, populations considered, the context of site risks to other risks and how the remedy will address site risks;

(g) Establish chemical and site specific information, where appropriate for purpose of risk assessment. Risk assessments should use chemical and site specific data and analysis, such as toxicity, exposure and fate and transport evaluations in preference to default assumptions. Where chemical and site specific data are not available, a range and distribution of realistic and plausible assumptions should be employed;

(h) Establish criteria to evaluate and approve methods for the measurement of contaminants using the practical quantitation level and related laboratory standards and practices to be used by certified laboratories;

(i) Establish standards and procedures for the utilization of certificates of completion, land use covenants and other legal documents necessary to effectuate the purposes of this article; and

(j) Establish any other rules necessary to carry out the requirements and the legislative intent of this act. (1996, c. 92.)

Editor's notes. — Concerning the reference to "the effective date of this section." Acts 1996, c. 92, which enacted this section, provided that the act take effect July 1, 1996.

§ 22-22-4. Voluntary remediation program; eligibility application and fee; information available to public; confidentiality of trade secrets; information; criminal penalties; requirements of site assessment; rejection or return of application; appeal of rejection.

(a) Any site is eligible for participation in the voluntary remediation program, except those sites subject to a federal environmental protection agency unilateral enforcement order, under § 104 through § 106 of the "Comprehensive Environmental Response, Compensation and Liability Act", 94 Stat. 2779, 42 U.S.C. § 9601, as amended, or have been listed or proposed to be listed by the United States environmental protection agency on the priorities list of Title I of said act, or subject to a unilateral enforcement order under § 3008 and § 7003 of the "Resource Conservation and Recovery Act" or any unilateral enforcement order for corrective action under this chapter: Provided, That the release which is subject to remediation was not created through gross negligence or willful misconduct. In order to participate in the voluntary remediation program, a person must submit an application to the director and enter into a voluntary remediation agreement as set forth in section seven [§ 22-22-7] of this article.

(b) Any person who desires to participate in the voluntary remediation program must submit to the division an application and an application fee established by the director. The application shall be on a form provided by the director and contain the following information: The applicant's name, address, financial and technical capability to perform the voluntary remediation, a general description of the site, a site assessment of the actual or potential contaminants made by a licensed remediation specialist and all other information required by the director.

(c) The director shall promulgate a legislative rule establishing a reasonable application fee. Fees collected under this section shall be deposited to the credit of the voluntary remediation fund in the state treasury as established in section six [§ 22-22-6] of this article.

(d) Information obtained by the division 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. In submitting data under this article, any person required to provide such confidential data may designate the data which that person believes is entitled to protection under this section and submit such designated data separately from other data submitted under this article. This designation request shall be made in writing. Any person who 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 a county jail for not more than one year, or both fined and imprisoned.

(e) The site assessment must include a legal description of the site; a description of the physical characteristics of the site and the general operational history of the site to the extent that the history is known by the applicant, and information of which the applicant is aware concerning the nature and extent of any known contamination at the site and immediately contiguous to the site, or wherever the contamination came to be located.

(f) The director may reject or return an application if:

(1) A federal requirement precludes the eligibility of the site;

(2) The application is not complete and accurate; or

(3) The site is ineligible under the provisions of this article.

(g) The director shall act upon all applications within forty-five days of receipt, unless an extension of time is mutually agreed to and confirmed in writing. If an application is returned by the director because it is not complete or accurate, the director shall provide the applicant a list of all information that is needed to make the application complete or accurate. The applicant may resubmit an application without submitting an additional application fee.

(h) If the director rejects the application, then he or she shall notify the applicant that the application has been rejected and provide an explanation of the reasons for the rejection. The applicant may, within twenty-five days of rejection, indicate his desire to resubmit the application. Upon final determination by the director, if the application is rejected, the director shall return one half of the application fee. The applicant may appeal the director's rejection of the application to the environmental quality board established under article three [§ 22B-3-1 et seq.], chapter twenty-two-b of this code.

(i) Upon withdrawal of an application, the applicant is entitled to the refund of one half of the application fee. (1996, c. 92.)

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

§ 22-22-5. Brownfield application; remediation process; brownfield remediation; eligibility; application; remediation loan; and obtaining information from director.

(a) For brownfield property, any environmental remediation undertaken pursuant to this article, by a development authority or any person who did not cause or contribute to the contamination on the property shall comply with the appropriate standards established by the director pursuant to this article and rules promulgated hereunder. After conferring with the director, the person may apply to the director for a site assessment loan under section six [§ 22-22-6] of this article. A site assessment must be conducted to establish existing contamination of the site. An application for brownfield remediation must be submitted along with the application fee. The procedures established for voluntary remediation set forth in section four [§ 22-22-4] must be followed. The director shall establish a reasonable application fee.

(b) Brownfield sites being remediated by persons who did not cause or contribute to the contamination of the site are eligible for consideration for remediation loans established under article fifteen [§ 31-15-1 et seq.], chapter thirty-one of this code.

(c) Persons undertaking brownfield remediation, who did not cause or contribute to the contamination of the brownfield site, may obtain all information relating to contamination at the site in the possession of the director prior to engaging in a site assessment. (1996, c. 92.)

§ 22-22-6. Voluntary remediation administrative fund established; voluntary remediation fees authorized; brownfields revolving fund established; disbursement of funds moneys; employment of specialized persons authorized.

(a) There is hereby created in the state treasury a special revenue fund known as the "Voluntary Remediation Administrative Fund". The fund shall operate as a special fund whereby all deposits and payments thereto do not expire to the general revenue fund, but shall remain in the fund and be available for expenditure in succeeding fiscal years. This fund shall consist of fees collected by the director in accordance with the provisions of this article as well as interest earned on investments made from moneys deposited in the fund. Moneys from this fund shall be expended by the director for the administration, licensing, enforcement, inspection, monitoring, planning, research and other activities required by this article.

The director 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 voluntary remediation fees applicable to persons who conduct activities subject to the provisions of this article. The fees may include an appropriate assessment of other program costs not otherwise attributable to any specific site but necessary for the administrative activities required to carry out the provisions of this article.

(b) There is hereby created in the state treasury a special revenue fund known as the "Brownfields Revolving Fund". The fund shall be comprised of moneys allocated to the state by the federal government expressly for the purposes of establishing and maintaining a state brownfields redevelopment revolving fund, all receipts from loans made from the fund, any moneys appropriated by the Legislature, all income from the investment of moneys held in the fund, and all other sums designated for deposit to the fund from any source, public or private. The fund shall operate as a special fund whereby all deposits and payments thereto do not expire to the general revenue fund, but shall remain in the account and be available for expenditure in succeeding fiscal years. Moneys in the fund, to the extent that moneys are available, shall be used solely to make loans to persons to finance site assessments of eligible brownfield sites and such other activities as authorized by any federal grant received or any legislative appropriation: Provided, That moneys in the fund may be utilized to defray those costs incurred by the division in administering

the provisions of this subsection. The director shall promulgate rules in accordance with the provisions of chapter twenty-nine-a of this code, to govern the disbursement of moneys from the fund, and establish a state brownfields redevelopment assistance program to direct the distribution of loans from the fund, and establish the interest rates and repayment terms of such loans: Provided, however, That amounts in the fund, other than those appropriated by the federal government, and which are found from time to time to exceed the amount needed for the purposes set forth in this article, may be transferred to other accounts or funds and redesignated for other purposes through appropriations of the Legislature.

In order to carry out the administration and management of the fund, the division is authorized to employ officers, agents, advisors and consultants including attorneys, financial advisors, engineers, other technical advisors and public accountants and, not withstanding any provisions of this code to the contrary, to determine their duties and compensation without the approval of any other agency or instrumentality. (1996, c. 92.)

§ 22-22-7. Voluntary remediation agreement; required use of licensed remediation specialist; required provisions of a voluntary remediation agreement; failure to reach agreement; appeal to the environmental quality board; no enforcement action when subject of agreement.

Upon acceptance of an application, the director shall enter into an agreement with the applicant for the remediation of the site which sets forth the following:

(a) A person desiring to participate in the voluntary remediation program must enter into a voluntary remediation agreement that sets forth the terms and conditions of the evaluation of the reports and the implementation of work plans;

(b) Any voluntary remediation agreement approved by the director shall provide for the services of a licensed remediation specialist for supervision of all activities described in the agreement;

(c) A voluntary remediation agreement must provide for cost recovery of all reasonable costs incurred by the division in review and oversight of the person's work plan and reports as a result of field activities or attributable to the voluntary remediation agreement, which are in excess of the fees submitted by the applicant along with a schedule of payments; appropriate tasks, deliverables and schedules for performance of the remediation; a listing of all statutes and rules for which compliance is mandated; a description of any work plan or report to be submitted for review by the director, including a final report that provides all information necessary to verify that all work contemplated by the agreement has been completed; the licensed remediation specialist's supervision of remediation contractors; and a listing of the technical standards to be applied in evaluating the work plans and reports, with

reference to the proposed future land use to be achieved. The voluntary remediation agreement may also provide for alternate dispute resolutions between the parties to the agreement, including, but not limited to, arbitration or mediation of any disputes under this agreement;

(d) No voluntary remediation agreement may be modified or amended, unless the amendment or modification is reduced to writing and mutually agreed upon by the parties to the agreement: Provided, That when the director determines that there is an imminent threat to the public, he or she may unilaterally modify or amend the agreement;

(e) Upon acceptance of an application, the director and the applicant shall develop a remediation agreement. If an agreement is not reached between the applicant and the director on or before the thirty-first day after the application has been accepted, either party may withdraw from negotiations. Should this occur, the agency retains the application fee. The applicant may appeal the failure to reach agreement to the environmental quality board as established under article three [§ 22B-3-1 et seq.], chapter twenty-two-b of this code. By mutual agreement, when it becomes impractical to reach an agreement within thirty-one days, the time limit may be extended in writing; and

(f) The division may not initiate an enforcement action against a person who is in compliance with this section for the contamination that is the subject of the voluntary remediation agreement or for the activity that resulted in the contamination, unless there is an imminent threat to the public. (1996, c. 92.)

§ 22-22-8. Voluntary remediation work plans and reports.

After signing a voluntary remediation agreement, the person undertaking remediation shall prepare and submit the appropriate work plans and reports to the director. The director shall review and evaluate the work plans and reports for accuracy, quality and completeness. The director may approve a voluntary remediation work plan or report or disapprove and notify the person of additional information needed to obtain approval. (1996, c. 92.)

§ 22-22-9. Termination of agreement; cost of recovery; legal actions.

The person undertaking remediation may, in their sole discretion, terminate the agreement as provided by the terms of the agreement and by giving fifteen days advance written notice of termination. Only those costs incurred or obligated by the director before notice of termination of the agreement are recoverable, if the agreement is terminated. The termination of the agreement does not affect any right the director may have under any other law to recover costs. The person undertaking the remediation must pay the division's costs associated with the voluntary remediation within thirty-one days after receiving notice that the costs are due and owing. The director may bring an action in Kanawha County circuit court or in the circuit court in the county wherein the property is situated to recover the amount owed to the division and reasonable legal expenses. (1996, c. 92.)

§ 22-22-10. Inspections; right of entry; sampling; reports and analyses.

(a) The director, upon presentation of proper credentials may enter any building, property, premises, place or facility where brownfield or voluntary remediation activities are being or have been performed for the purpose of making an inspection to ascertain the compliance by any person with the provisions of this article or the rules promulgated by the director.

(b) The director shall make periodic inspections at sites subject to this article. After an inspection is made, a report shall be filed with the director and a copy shall be provided to the person who is responsible pursuant to the voluntary agreement for remediation activities. The reports shall not disclose any confidential information protected under the provisions of subsection (d), section four [§ 22-22-4(d)] of this article. The 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) The director may, upon presentation of proper credentials, enter any building, motor vehicle, property, premises or site where brownfield or voluntary remediation activities are being or have been performed and take samples of wastes, soils, air, surface water and groundwater. In taking such samples, the director may utilize such sampling methods as are necessary in exercising good scientific technique. Following the taking of any sample, the director shall give the person responsible in the voluntary agreement for remediation activities a receipt describing the sample obtained and if requested, a portion of each sample equal in volume or weight to the portion retained. The director shall promptly provide a copy of any analysis made to the responsible person named in the voluntary agreement.

(d) Upon presentation of proper credentials, the director shall be given access to all records relating to a brownfield or voluntary remediation. (1996, c. 92.)

§ 22-22-11. Licensed remediation specialist, licensure procedures.

(a) No person may practice as a licensed remediation specialist without a license issued by the director. Any violation of this provision shall be subject to the enforcement orders as set forth in section twelve [§ 22-22-12] of this article.

(b) To obtain a license, a person must apply to the director in writing on forms approved and supplied by the director. Each application for examination for license shall contain:

(1) The full name of the person applying for the license;

(2) The principal business address of the applicant;

(3) All formal academic education and experience of the applicant to demonstrate professional expertise of the applicant;

(4) If waiver of the examination is being requested, any license or certification that the person desires to be considered as part of the waiver request;

(5) The examination fee; and

(6) Any other necessary information prescribed by the director.

(c) The director shall establish the date, time and location of licensed remediation specialist examinations.

(d) The applicant must demonstrate that he or she possesses a practical knowledge of the remediation activities; procedures necessary to remediate a site; and the management of contaminants at a site, including, but not limited to, site investigation, health and safety protocol, quality assurance, feasibility studies and remedial design.

(e) If the director does not certify the remediation specialist applicant, the director shall inform the applicant in writing of the reasons therefor. The director may not deny a license without cause.

(f) It is the licensed remediation specialist's duty to protect the safety, health and welfare of the public as set forth in this article, in the performance of his or her professional duties. The licensed remediation specialist is responsible for any release of contaminants during remediation activities undertaken pursuant to the approved remediation agreement, work plans or reports. If a licensed remediation specialist faces a situation where he or she is unable to meet this duty, the licensed remediation specialist may either sever the relationship with the client or employer or refuse professional responsibility for work plan, report or design. The specialist shall notify the division, if there is a threat to the environment or the health, safety or welfare of the public.

(g) A licensed remediation specialist shall only perform assignments for which the specialist is qualified by training and experience in those specific technical fields; be objective in work plans, reports and opinions; and avoid any conflict of interest with employer, clients and suppliers. A licensed remediation specialist shall not solicit or accept gratuities, directly or indirectly from contractors, agents or other parties dealing directly with the employer or client in regard to professional services being performed at the work site; accept any type of bribe; falsify or permit misrepresentation of professional qualifications; intentionally provide false information to the director; or knowingly associate with one who is engaging in business or professional practices of a fraudulent or dishonest nature.

(h) A licensed remediation specialist shall not charge any special fees above usual and customary professional rates for being licensed.

(i) The license issued by the director may be renewed every two years for any licensed remediation specialist in good standing. The director, by rule, shall establish license fees.

(j) The director is authorized to revoke a license; suspend a license for not more than five years or impose lesser sanctions as may be appropriate for acts or omissions in violation of this article. (1996, c. 92.)

§ 22-22-12. Enforcement orders for licensed remediation specialists; cease and desist order; criminal penalties.

(a) If the director, upon inspection, investigation or through other means observes, discovers or learns that a licensed remediation specialist has violated

the provisions of this article or any rules promulgated hereunder, the director 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, orders suspending or revoking licenses, orders requiring a person to take remedial action or cease and desist orders; or

(2) Request the prosecuting attorney of the county in which the alleged violation occurred bring a criminal action as provided for herein.

(b) Any person issued an order may file a request for reconsideration with the director within seven days of the receipt of the order. The director shall conduct a hearing on the merits of the order within ten days of the filing of the request for reconsideration. The filing of a notice of request for reconsideration does not stay or suspend the execution or enforcement of the order.

(c) Any licensed remediation specialist who fraudulently misrepresents that work has been completed and such action results in an unjustified and inexcusable disregard for the safety of others, thereby placing another in imminent danger or contributing to ongoing harm to the environment, he or she shall be guilty of a felony and, upon conviction thereof, shall be fined not more than fifty thousand dollars or imprisoned not less than one nor more than two years, or both such fine and imprisonment.

(d) If any person associated with remediation of a brownfield or voluntary remediation site engages in fraudulent acts or representations to the division, he or she shall be guilty of a felony and, upon conviction thereof, shall be fined not more than fifty thousand dollars or imprisoned not less than one nor more than two years, or both. (1996, c. 92.)

§ 22-22-13. Certificate of completion.

(a) The licensed remediation specialist shall issue a final report to the person undertaking the voluntary remediation when the property meets the applicable standards and all work has been completed as contemplated in the voluntary remediation agreement or the site assessment shows that all applicable standards are being met. Upon receipt of the final report, the person may seek a certificate of completion from the director.

(b) The director may delegate the responsibility for issuance of a certificate of completion to a licensed remediation specialist in limited circumstances, as specified by rule pursuant to this article.

(c) The certificate of completion shall contain a provision relieving a person who undertook the remediation and subsequent successors and assigns from all liability to the state as provided under this article which shall remain effective as long as the property complies with the applicable standards in effect at the time the certificate of completion was issued. This certificate is subject to reopener provisions of section fifteen [§ 22-22-15] of this article and may, if applicable, result in a land-use covenant as provided in section fourteen [§ 22-22-14] of this article. (1996, c. 92.)

§ 22-22-14. Land-use covenant; criminal penalties.

(a) The director shall establish by rule, criteria for deed recordation of land-use covenants and containing all necessary deed restrictions. The director shall cause all land-use covenants to appear in the chain of title by deed to be properly recorded in the office of the county clerk where the remediation site is located. If institutional and engineering controls are used, in whole or in part, to achieve a remediation standard, the director shall direct that a land-use covenant be applied. The covenant shall include whether residential or nonresidential exposure factors were used to comply with the site-specific standard. The covenant shall contain a provision relieving the person who undertook the remediation and subsequent successors and assigns from all civil liability to the state as provided under this article and shall remain effective as long as the property complies with the applicable standards in effect at the time the covenant was issued.

(b) Whoever knowingly violates a land-use covenant by converting nonresidential property to residential property is guilty of a felony, and, upon conviction thereof, shall be fined not more than twenty-five thousand dollars, imprisoned for not more than five years, or both. (1996, c. 92.)

§ 22-22-15. Reopeners.

Any person who completes remediation in compliance with this article shall not be required to undertake additional remediation actions for contaminants subject to the remediation, unless the director demonstrates that:

(a) Fraud was committed in demonstrating attainment of a standard at the site that resulted in avoiding the need for further remediation of the site;

(b) New information confirms the existence of an area of a previously unknown contamination which contains contaminants that have been shown to exceed the standards applied to the previous remediation at the site;

(c) The level of risk is increased significantly beyond the established level of protection at the site due to substantial changes in exposure conditions, such as, a change in land use, or new information is obtained about a contaminant associated with the site which revises exposure assumptions beyond the acceptable range. Any person who changes the use of the property causing the level of risk to increase beyond established protection levels shall be required by the division to undertake additional remediation measures under the provisions of this article;

(d) The release occurred after the effective date of this article on a site not used for industrial activity prior to the effective date of this article; the remedy relied, in whole or in part, upon institutional or engineering controls instead of treatment or removal of contamination; and treatment, removal or destruction has become technically and economically practicable; or

(e) The remediation method failed to meet the remediation standard or combination of standards.

In the event that any of the foregoing circumstances occur, the remediation agreement will be reopened and revised to the extent necessary to return the site to its previously agreed to state of remediation or other appropriate standard. (1996, c. 92.)

Effective dates. — Concerning the references in (d) to "the effective date of this article," Acts 1996, c. 92, which enacted this article, provided that the act take effect July 1, 1996.

§ 22-22-16. Duty of assessor and citizens to notify director when change of property use occurs.

If an assessor in any county becomes aware of a change of remediated property use from nonresidential property to residential, the assessor shall check the land record of the county to ascertain if a land-use covenant appears to have been violated. Should it appear that a violation has occurred, the assessor shall notify the director in writing of the suspected violation. If any citizen becomes aware of a change of property use from nonresidential to residential, the citizen may check the land record of the county to ascertain if a land use covenant appears to have been violated and may notify the director in writing. The director shall then investigate and proceed with any necessary enforcement action. (1996, c. 92.)

§ 22-22-17. Public notification for brownfields.

Persons undertaking the remediation and revitalization of brownfield sites shall comply with the following public notice and review requirements:

(a) A notice of intent to remediate a site shall be submitted to the division which provides, to the extent known, a brief description of the location of t site, a listing of the contaminants involved and the proposed remediat measures. The division shall publish an acknowledgment noting the receipt o the notice of intent in a division publication of general circulation. At the time a notice of intent to remediate a site is submitted to the division, a copy of such notice shall be provided to the municipality and the county in which the site is located and a summary of the notice of intent shall be published in a newspaper of general circulation serving the area in which the site is located.

(b) The notice required by this subsection shall include a thirty-day public, county and municipal comment period during which the public, county and municipality can request to be involved in the development of the remediation and reuse plans for the site. If requested by the public, county, municipality or the director, the person undertaking the remediation shall develop and implement a public involvement program plan which meets the requirements set forth by the director. (1996, c. 92.)

§ 22-22-18. Environmental liability protection.

(a) Any person demonstrating compliance with the applicable standards established in section three [§ 22-22-3] of this article, whether by remediation or where the site assessment shows that the contamination at the site meets applicable standards, shall be relieved of further liability for the remediation of the site under this chapter. Contamination identified in the remediation agreement submitted to and approved by the division shall not be subject to citizen suits or contribution actions. The protection from further remediation liability provided by this article applies to the following persons:

(1) The current or future owner or operator of the site, including development authorities and fiduciaries who participated in the remediation of the site;

(2) A person who develops or otherwise occupies the site;

(3) A successor or assign of any person to whom the liability protection applies;

(4) A public utility, as defined in section two [§ 24-1-2], article one, chapter twenty-four of this code, and for the purpose of this article, a utility engaged in the storage and transportation of natural gas, to the extent the public utility performs activities on the site;

(5) A remediation contractor;

(6) A licensed remediation specialist; and

(7) A lender or developer who engages in the routine practices of commercial lending, including, but not limited to, providing financial services, holding of security interests, workout practices, foreclosure or the recovery of funds from the sale of a site.

(b) A person shall not be considered a person responsible for a release or a threatened release of contaminants simply by virtue of conducting or having a site assessment conducted. Nothing in this section relieves a person of any liability for failure to exercise due diligence in performing a site assessment. (1996, c. 92.)

§ 22-22-19. Establishing and limiting the responsibilities of remediation contractors.

(a) A person who is engaged in the business of remediation contractor under this article is not responsible for a release or threatened release of contaminants at the site described in the voluntary remediation agreement for work properly performed pursuant to the agreement.

(b) A person who is engaged in the business of remediation contractor under this article is not liable for any harm, damage or injury caused by a release of a contaminant which occurred prior to the contractor undertaking work at the site.

(c) Limitation of liability, pursuant to subsections (a) and (b) of this section does not apply to a release or threatened release of contaminants at the site described in the voluntary remediation agreement that is directly caused by an act or omission which constitutes gross negligence or by the willful misconduct of the remediation contractor.

(d) A remediation contractor is not required to obtain a permit for remediation activities, if a permit is required under article five, eleven, fifteen or eighteen [§ 22-5-1 et seq., § 22-11-1 et seq., § 22-15-1 et seq. or § 22-18-1 et seq.] of this chapter. However, an owner or operator of the site to be remediated is not relieved of the permit requirements, if any, for remediation activities undertaken at the site. A remediation contractor must comply with all applicable state and federal laws in the transportation, treatment, storage and disposal of contaminants generated as a consequence of the remediation activities.

(e) A remediation contractor is not a "generator" for the purposes of the generator assessments imposed pursuant to article twenty [§ 22-20-1 et seq.] of this chapter. (1996, c. 92.)

§ 22-22-20. Affirmative defenses.

Any person who is alleged to have violated an environmental law or the common law equivalent, which occurred while acting pursuant to this article, may affirmatively plead the following in response to an alleged violation:

(a) An act of God;

(b) An intervening act of a public agency;

(c) Migration from property owned by a third party;

(d) Actions taken or omitted in the course of rendering care, assistance or advice in accordance with the environmental laws or at the direction of the division;

(e) An act of a third party who was not an agent or employee of the lender, fiduciary, developer, remediation contractor or development authority; or

(f) If the alleged liability for a lender, fiduciary, developer or development authority arises after foreclosure, and the lender, fiduciary, developer or development authority exercised due care with respect to the lender's, fiduciary's, developer's or development authority's knowledge about the contaminants, and took reasonable precautions based upon such knowledge against foreseeable actions of third parties and the consequences arising therefrom. A lender, fiduciary, developer, remediation contractor or development authority may avoid liability by proving any other defense which may be available to it. (1996, c. 92.)

§ 22-22-21. Savings clause.

Nothing in this article shall affect the rights, duties, defenses, immunities or causes of action under other statutes or the common law of this state which may be applicable to persons conducting remediation of a site. (1996, c. 92.)

ARTICLE 22A.

WEST VIRGINIA LIMITED LIABILITY FOR PERSONS RESPONDING TO OIL DISCHARGES ACT.

Sec.
22-22A-1. Short title.
22-22A-2. Definitions.
22-22A-3. Exemption from liability.

§ 22-22A-1. Short title.

This article may be cited as the "West Virginia Limited Liability for Persons Responding to Oil Discharges Act". (1996, c. 125.)

§ 22-22A-2. Definitions.

For the purposes of this article:

(a) "Damages" means damages of any kind for which liability may exist under the laws of this state resulting from, arising out of, or related to the discharge or threatened discharge of oil;

(b) "Discharge" means any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping;

(c) "Federal on-scene coordinator" means the federal official designated by the lead agency or predesignated by the United States environmental protection agency or the United States coast guard to coordinate and direct responses under the national contingency plan (NCP);

(d) "National contingency plan" means the national contingency plan prepared and published under Section 311(d) of the federal Water Pollution Control Act, 33 U.S.C. § 1321(d), as amended by the Oil Pollution Act of 1990, Public Law No. 101-380, 104 Stat. 484 (1990) as in effect as of the effective date of this article;

(e) "Oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse and oil mixed with wastes other than dredged spoil;

(f) "Person" means an individual, corporation, partnership, association, state, municipality, commission or political subdivision of a state or any interstate body;

(g) "Remove" or "removal" means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife and public and private property, shorelines and beaches;

(h) "Removal costs" means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize or mitigate oil pollution from such an incident; and

(i) "Responsible party" means a responsible party as defined under § 1001 of the Oil Pollution Act of 1990, Public Law No. 101-380, 104 Stat. 484 (1990). (1996, c. 125.)

Editor's notes. — Concerning the reference in (d) to "the effective date of this article," Acts 1996, c. 125, which enacted this article, passed March 9, 1996, and became effective 90 days from passage.

§ 22-22A-3. Exemption from liability.

(a) Notwithstanding any other provision of this code to the contrary, a person engaged in removal activities is not liable for removal costs or damages which result from acts or omissions in the course of rendering care, assistance or advice consistent with the national contingency plan or as otherwise

directed by the federal on-scene coordinator or by the state official charged with responsibility for oil discharge responses.

(b) Subsection (a) of this section does not apply:

(1) To a responsible party;

(2) With respect to personal injury or wrongful death; or

(3) If the person is grossly negligent or engages in willful misconduct.

(c) A responsible party is liable for any removal costs and damages that another person is relieved of under the provisions of subsection (a) of this section.

(d) Nothing in this section affects the liability of a responsible party for oil spill response under state law. (1996, c. 125.)