

1 COMMITTEE SUBSTITUTE

2 FOR

3 **H. B. 2352**

4 (By R. Phillips, Stowers, Skaff and Boggs)

5 (Originating in the House Committee on the Judiciary)

6
7
8 [March 29, 2013]

9
10 A BILL to amend and reenact §22-3-11 of the Code of West Virginia,
11 1931, as amended, relating to clarifying that the West
12 Virginia Department of Environmental Protection does not
13 assume a mine operator's obligations or liabilities under the
14 Water Pollution Control Act for compliance with the mine
15 operator's National Pollutant Discharge Elimination System
16 ("NPDES") Permit where the West Virginia Department of
17 Environmental Protection performs reclamation at a bond
18 forfeiture site; clarifying that reclamation efforts
19 undertaken by the West Virginia Department of Environmental
20 Protection at bond forfeiture sites are considered
21 construction activities; and providing tax incentives for mine
22 operators who reclaim bond forfeiture sites.

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

24 That §22-3-11 of the Code of West Virginia, 1931, as amended,
25 be amended and reenacted to read as follows:

26 **ARTICLE 3. SURFACE COAL MINING AND RECLAMATION ACT.**

1 **§22-3-11. Bonds; amount and method of bonding; bonding**
2 **requirements; special reclamation tax and funds;**
3 **prohibited acts; period of bond liability.**

4 (a) After a surface mining permit application has been
5 approved pursuant to this article, but before a permit has been
6 issued, each operator shall furnish a penal bond, on a form to be
7 prescribed and furnished by the secretary, payable to the State of
8 West Virginia and conditioned upon the operator faithfully
9 performing all of the requirements of this article and of the
10 permit. The penal amount of the bond shall be not less than \$1,000
11 nor more than \$5,000 for each acre or fraction of an acre:
12 *Provided*, That the minimum amount of bond furnished for any type of
13 reclamation bonding shall be \$10,000. The bond shall cover: (1)
14 The entire permit area; or (2) that increment of land within the
15 permit area upon which the operator will initiate and conduct
16 surface mining and reclamation operations within the initial term
17 of the permit. If the operator chooses to use incremental bonding,
18 as succeeding increments of surface mining and reclamation
19 operations are to be initiated and conducted within the permit
20 area, the operator shall file with the secretary an additional bond
21 or bonds to cover the increments in accordance with this section:
22 *Provided, however*, That once the operator has chosen to proceed
23 with bonding either the entire permit area or with incremental
24 bonding, the operator shall continue bonding in that manner for the
25 term of the permit.

1 (b) The period of liability for bond coverage begins with
2 issuance of a permit and continues for the full term of the permit
3 plus any additional period necessary to achieve compliance with the
4 requirements in the reclamation plan of the permit.

5 (c) (1) The form of the bond shall be approved by the
6 secretary and may include, at the option of the operator, surety
7 bonding, collateral bonding (including cash and securities),
8 establishment of an escrow account, self bonding or a combination
9 of these methods. If collateral bonding is used, the operator may
10 elect to deposit cash or collateral securities or certificates as
11 follows: Bonds of the United States or its possessions of the
12 Federal Land Bank or of the Homeowners' Loan Corporation; full
13 faith and credit general obligation bonds of the State of West
14 Virginia or other states and of any county, district or
15 municipality of the State of West Virginia or other states; or
16 certificates of deposit in a bank in this state, which certificates
17 shall be in favor of the department. The cash deposit or market
18 value of the securities or certificates shall be equal to or
19 greater than the penal sum of the bond. The secretary shall, upon
20 receipt of any deposit of cash, securities or certificates,
21 promptly place the same with the Treasurer of the State of West
22 Virginia whose duty it is to receive and hold the deposit in the
23 name of the state in trust for the purpose for which the deposit is
24 made when the permit is issued. The operator making the deposit is
25 entitled, from time to time, to receive from the State Treasurer,
26 upon the written approval of the secretary, the whole or any

1 portion of any cash, securities or certificates so deposited, upon
2 depositing with him or her in lieu thereof cash or other securities
3 or certificates of the classes specified in this subsection having
4 value equal to or greater than the sum of the bond.

5 (2) The secretary may approve an alternative bonding system if
6 it will: (A) Reasonably assure that sufficient funds will be
7 available to complete the reclamation, restoration and abatement
8 provisions for all permit areas which may be in default at any
9 time; and (B) provide a substantial economic incentive for the
10 permittee to comply with all reclamation provisions.

11 (d) The secretary may accept the bond of the applicant itself
12 without separate surety when the applicant demonstrates to the
13 satisfaction of the secretary the existence of a suitable agent to
14 receive service of process and a history of financial solvency and
15 continuous operation sufficient for authorization to self insure.

16 (e) It is unlawful for the owner of surface or mineral rights
17 to interfere with the present operator in the discharge of the
18 operator's obligations to the state for the reclamation of lands
19 disturbed by the operator.

20 (f) All bond releases shall be accomplished in accordance with
21 the provisions of section twenty-three of this article.

22 (g) (1) The Special Reclamation Fund previously created is
23 continued. The Special Reclamation Water Trust Fund is created
24 within the State Treasury into and from which moneys shall be paid
25 for the purpose of assuring a reliable source of capital to reclaim
26 and restore water treatment systems on forfeited sites. The moneys

1 accrued in both funds, any interest earned thereon and yield from
2 investments by the State Treasurer or West Virginia Investment
3 Management Board are reserved solely and exclusively for the
4 purposes set forth in this section and section seventeen, article
5 one of this chapter. The funds shall be administered by the
6 secretary who is authorized to expend the moneys in both funds for
7 the reclamation and rehabilitation of lands which were subjected to
8 permitted surface mining operations and abandoned after August 3,
9 1977, where the amount of the bond posted and forfeited on the land
10 is less than the actual cost of reclamation, and where the land is
11 not eligible for abandoned mine land reclamation funds under
12 article two of this chapter. The secretary shall develop a
13 long-range planning process for selection and prioritization of
14 sites to be reclaimed so as to avoid inordinate short-term
15 obligations of the assets in both funds of such magnitude that the
16 solvency of either is jeopardized. The secretary may use both
17 funds for the purpose of designing, constructing and maintaining
18 water treatment systems when they are required for a complete
19 reclamation of the affected lands described in this subsection.
20 The secretary may also expend an amount not to exceed ten percent
21 of the total annual assets in both funds to implement and
22 administer the provisions of this article and, as they apply to the
23 Surface Mine Board, articles one and four, chapter twenty-two-b of
24 this code.

25 (2) In the event of a bond forfeiture, the permit obligations
26 and corresponding liabilities arising under the original National

1 Pollutant Discharge Elimination System permit, issued to the mine
2 operator pursuant to the Water Pollution Control Act (W.Va. Code
3 §22-11 et seq.), remain with the mine operator and do not pass to
4 the Secretary or other third party, including any land or mineral
5 owner. However, in the event of bond forfeiture, the Secretary
6 shall complete reclamation and ensure that discharges of pollutants
7 from the forfeited site are treated pursuant to a National
8 Pollutant Discharge Elimination System permit.

9 (3) Reclamation efforts undertaken by the Secretary, including
10 the construction and maintenance of water pollution treatment
11 systems, shall be considered construction activities subject to the
12 requirements of the applicable reclamation plan.

13 (4) The jurisdiction of the secretary over a bond forfeiture
14 site terminates upon the completion of reclamation. Jurisdiction
15 does not terminate over the area necessary for the operation and
16 maintenance of water treatment facilities until the facilities are
17 removed pursuant to the National Pollutant Discharge Elimination
18 System program.

19 (5) (A) A tax credit shall be granted against the tax imposed
20 by subsection (i) of this section to any mine operator who performs
21 reclamation or remediation at a bond forfeiture site which
22 otherwise would have been reclaimed using funds from the Special
23 Reclamation Fund or Special Reclamation Water Trust Fund. The
24 amount of credit shall be determined as provided in this section.

25 (B) The amount of a reclamation tax credit granted under this
26 subsection shall be equal to the amount that the Tax Commissioner

1 determines, based on the project costs, as shown in the records of
2 the secretary, that would have been spent from the Special
3 Reclamation Fund or Special Reclamation Water Trust Fund to
4 accomplish the reclamation or remediation performed by the mine
5 operator, including expenditures for water treatment.

6 (C) To claim the credit, the mine operator shall from time to
7 time file with the Tax Commissioner a written application seeking
8 the amount of the credit earned. Within thirty days of receipt of
9 the application, the Tax Commissioner shall issue a certification
10 of the amount of tax credit, if any, to be allocated to the
11 eligible taxpayer. Should the amount of the credit certified be
12 less than the amount applied for, the Tax Commissioner shall set
13 forth in writing the reason for the difference. Should no
14 certification be issued within the thirty-day period, the
15 application will be deemed certified. Any decision by the Tax
16 Commissioner is appealable pursuant to the provisions of the "West
17 Virginia Tax Procedure and Administration Act" set forth in article
18 ten, chapter eleven of the code. Applications for certification of
19 the proposed tax credit shall contain the information and be in the
20 detail and form as required by the Tax Commissioner.

21 (h) The secretary may propose rules for legislative approval
22 in accordance with article three, chapter twenty-nine-a of this
23 code to carry out the policy and purposes of this article, to
24 provide any necessary clarification of the provisions of this
25 section and to efficiently provide for the general administration
26 of this section. The Tax Commissioner may promulgate rules for

1 legislative approval pursuant to the provisions of article three,
2 chapter twenty-nine-a of this code to carry out the purposes of
3 this section.

4 ~~(h)~~ (i) (1) *Rate, deposits and review.*

5 (A) For tax periods commencing on and after July 1, 2009,
6 every person conducting coal surface mining shall remit a special
7 reclamation tax of fourteen and four-tenths cents per ton of clean
8 coal mined, the proceeds of which shall be allocated by the
9 secretary for deposit in the Special Reclamation Fund and the
10 Special Reclamation Water Trust Fund.

11 (B) For tax periods commencing on and after July 1, 2012, the
12 rate of tax specified in paragraph (A) of this subdivision is
13 discontinued and is replaced by the rate of tax specified in this
14 paragraph (B). For tax periods commencing on and after July 1,
15 2012, every person conducting coal surface mining shall remit a
16 special reclamation tax of twenty-seven and nine-tenths cents per
17 ton of clean coal mined, the proceeds of which shall be allocated
18 by the secretary for deposit in the Special Reclamation Fund and
19 the Special Reclamation Water Trust Fund. Of that amount, fifteen
20 cents per ton of clean coal mined shall be deposited into the
21 Special Reclamation Water Trust Fund.

22 (C) The tax shall be levied upon each ton of clean coal
23 severed or clean coal obtained from refuse pile and slurry pond
24 recovery or clean coal from other mining methods extracting a
25 combination of coal and waste material as part of a fuel supply.

26 (D) Beginning with the tax period commencing on July 1, 2009,

1 and every two years thereafter, the special reclamation tax shall
2 be reviewed by the Legislature to determine whether the tax should
3 be continued: *Provided*, That the tax may not be reduced until the
4 Special Reclamation Fund and Special Reclamation Water Trust Fund
5 have sufficient moneys to meet the reclamation responsibilities of
6 the state established in this section.

7 (2) In managing the Special Reclamation Program, the secretary
8 shall: (A) Pursue cost-effective alternative water treatment
9 strategies; and (B) conduct formal actuarial studies every two
10 years and conduct informal reviews annually on the Special
11 Reclamation Fund and Special Reclamation Water Trust Fund.

12 (3) Prior to December 31, 2008, the secretary shall:

13 (A) Determine the feasibility of creating an alternate
14 program, on a voluntary basis, for financially sound operators by
15 which those operators pay an increased tax into the Special
16 Reclamation Fund in exchange for a maximum per-acre bond that is
17 less than the maximum established in subsection (a) of this
18 section;

19 (B) Determine the feasibility of creating an incremental
20 bonding program by which operators can post a reclamation bond for
21 those areas actually disturbed within a permit area, but for less
22 than all of the proposed disturbance and obtain incremental release
23 of portions of that bond as reclamation advances so that the
24 released bond can be applied to approved future disturbance; and

25 (C) Determine the feasibility for sites requiring water
26 reclamation by creating a separate water reclamation security

1 account or bond for the costs so that the existing reclamation bond
2 in place may be released to the extent it exceeds the costs of
3 water reclamation.

4 (4) If the secretary determines that the alternative program,
5 the incremental bonding program or the water reclamation account or
6 bonding programs reasonably assure that sufficient funds will be
7 available to complete the reclamation of a forfeited site and that
8 the Special Reclamation Fund will remain fiscally stable, the
9 secretary is authorized to propose legislative rules in accordance
10 with article three, chapter twenty-nine-a of this code to implement
11 an alternate program, a water reclamation account or bonding
12 program or other funding mechanisms or a combination thereof.

13 ~~(i)~~ (j) This special reclamation tax shall be collected by the
14 State Tax Commissioner in the same manner, at the same time and
15 upon the same tonnage as the minimum severance tax imposed by
16 article twelve-b, chapter eleven of this code is collected:
17 *Provided*, That under no circumstance shall the special reclamation
18 tax be construed to be an increase in either the minimum severance
19 tax imposed by said article or the severance tax imposed by article
20 thirteen of said chapter.

21 ~~(j)~~ (k) Every person liable for payment of the special
22 reclamation tax shall pay the amount due without notice or demand
23 for payment.

24 ~~(k)~~ (l) The Tax Commissioner shall provide to the secretary a
25 quarterly listing of all persons known to be delinquent in payment
26 of the special reclamation tax. The secretary may take the

1 delinquencies into account in making determinations on the
2 issuance, renewal or revision of any permit.

3 ~~(i)~~ (m) The Tax Commissioner shall deposit the moneys
4 collected with the Treasurer of the State of West Virginia to the
5 credit of the Special Reclamation Fund and Special Reclamation
6 Water Trust Fund.

7 ~~(m)~~ (n) At the beginning of each quarter, the secretary shall
8 advise the State Tax Commissioner and the Governor of the assets,
9 excluding payments, expenditures and liabilities, in both funds.

10 ~~(n)~~ (o) To the extent that this section modifies any powers,
11 duties, functions and responsibilities of the department that may
12 require approval of one or more federal agencies or officials in
13 order to avoid disruption of the federal-state relationship
14 involved in the implementation of the federal Surface Mining
15 Control and Reclamation Act, 30 U. S. C. §1270 by the state, the
16 modifications will become effective upon the approval of the
17 modifications by the appropriate federal agency or official.