

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Committee Substitute

for

House Bill 4967

BY DELEGATES ANDERSON, ZATEZALO, HECKERT, RILEY,

FEHRENBACHER, STREET, BARNHART, CRISS, HORST,

AND WARNER

[Originating in the Committee on the Judiciary;

Reported on February 20, 2024]

1 A BILL to amend and reenact §22-22-1, §22-22-2, §22-22-3, §22-22-4, §22-22-5, §22-22-6, §22-
2 22-7, §22-22-8, §22-22-9, §22-22-10, §22-22-11, §22-22-12, §22-22-13, §22-22-14, §22-
3 22-15, §22-22-16, of the Code of West Virginia, 1931, as amended, to repeal §22-22-17
4 of said code, and amend and reenact §22-22-18 and §22-22-20, all relating to the
5 administration of the Voluntary Remediation and Redevelopment Act to provide new
6 liability protections for those who wish to purchase and redevelop former industrial
7 properties; defining terms and revising existing definitions; providing for rulemaking;
8 clarifying procedures involving the Brownfields Revolving Fund; revising public notice
9 provisions concerning the fund; providing that the Secretary may limit the liability of
10 lenders, innocent purchasers, landowners, de minimis contributors, or others who have
11 limited responsibility for contamination under the Hazardous Waste Management Act, the
12 Water Pollution Control Act, the Groundwater Protection Act or any other applicable law;
13 providing that bona fide prospective purchasers are not liable for a containment at a
14 brownfield site if defined conditions are met; providing that an innocent land owner who
15 holds title or security interest in a brownfield site are not liable for contamination at a
16 brownfield site if defined conditions are met; providing that a person that owns contiguous
17 real property that is contaminated by a release of a hazardous substance from real
18 property that is not owned by that person is not liable for contamination under defined
19 conditions; providing that the Secretary may require anyone responsible for contamination
20 to remediate sites where substances have been improperly managed; and making non-
21 substantive technical corrections.

Be it enacted by the Legislature of West Virginia:

ARTICLE 22. VOLUNTARY REMEDIATION AND REDEVELOPMENT ACT.

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

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

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

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

14 (d) The Legislature further finds that an administrative program should be established to
15 encourage persons to voluntarily develop and implement remedial plans without the need for
16 enforcement action by the ~~Division~~ Department of Environmental Protection. Therefore, it is the
17 purpose of this article to:

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

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

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

§22-22-2. Definitions.

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

2 (a) "Abandoned property" means real property for which the current owner cannot be
3 determined or cannot be located or property which has been forfeited to or acquired by the State
4 for the nonpayment of taxes pursuant to State law;

5 ~~(a)~~(b) "Applicable standards", mean the remediation levels established in or pursuant to
6 section three of this article;

7 (c) "Bona fide prospective purchaser" means a person or a tenant of a person who
8 acquires ownership, or proposes to acquire ownership, of real property after the release of
9 hazardous substances occurred;

10 ~~(b)(d) "Brownfield" means any industrial or commercial property, the expansion,~~
11 ~~redevelopment, or reuse of which may be complicated by the presence or potential presence of~~
12 ~~a hazardous substance, pollutant, or contaminant; which is abandoned or not being actively used~~
13 ~~by the owner as of the effective date of this article, but shall not include any site subject to a~~
14 ~~unilateral enforcement order under §104 through §106 of the "Comprehensive Environmental~~
15 ~~Response, Compensation and Liability Act", 94 Stat. 2779, 42 U.S.C. §9601, as amended, or~~
16 ~~which has been listed or proposed to be listed by the United States environmental protection~~
17 ~~agency on the priorities list of Title I of said act, or subject to a unilateral enforcement order under~~
18 ~~§3008 and §7003 of the "Resource Conservation Recovery Act" or any unilateral enforcement~~
19 ~~order for corrective action under this chapter;~~

20 ~~(e) "Certified laboratory" means any laboratory approved by the director under laboratory~~
21 ~~certification rules adopted pursuant to section fifteen, article one of this chapter;~~

22 (e) "Brownfields Revolving Fund" means the special revenue fund established to provide
23 loans for site assessments and remediation of eligible brownfield sites;

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

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

30 (h) "Department" means the West Virginia Department of Environmental Protection;

31 ~~(f)~~(i) "Development ~~a~~Authority" means any authority as defined in article twelve, chapter
32 seven of this code or the state Development Office as defined in ~~article two, chapter five-b~~ §2-5B-
33 1, et seq. of this code.

34 ~~(g)~~ "Director" means ~~the director of the Division of Environmental Protection or such other~~
35 ~~person to whom the director has delegated authority or duties pursuant to this article;~~

36 ~~(h)~~ "Division" means ~~the Division of Environmental Protection of the State of West Virginia;~~

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

41 ~~(j)~~(k) "Hazardous substance" means any substance identified as a hazardous substance
42 pursuant to the "Comprehensive Environmental Response, Compensation and Liability Act," 94
43 Stat. 2779, 42 U.S.C. §9601-9604-9606, as amended;

44 (l) "Innocent land owner" means a person who holds any title, security interest or any other
45 interest in a brownfield site and who acquired ownership of the real property after the release of
46 hazardous substances occurred;

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

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

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

59 ~~(m)~~(o) "Land-use covenant" means an environmental covenant within the meaning of §22-
60 22B-2(4) of this code, and is a document or deed restriction issued by the director Secretary on
61 remediated sites which have attained and demonstrate continuing compliance with site-specific
62 standards for any contaminants at the site and which is agreed to by the owner of the property.
63 The covenant shall be recorded by deed in the office of the county clerk of the county wherein the
64 site is situated. The document or covenant shall be included by any grantor or lessor in any deed
65 or other instrument of conveyance or any lease or other instrument whereby real property is let
66 for a period of one year or more, as more fully set forth in sections thirteen and fourteen of this
67 article;

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

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

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

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

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

86 (s) "Operator" means the person responsible for the overall operation of a facility site. A
87 person who executes a voluntary remediation agreement with the Secretary may be deemed an
88 operator for the purpose of carrying out the activities required by the government;

89 (t) "Owner" means any person owning or holding legal or equitable title or possessory
90 interest in property or, where title or control of property was conveyed due to bankruptcy,
91 foreclosure, tax delinquency, abandonment, or similar means to this state or a political subdivision
92 of this state;

93 ~~(t)(u)~~ (u) "Person" means any public or private corporation, institution, association, firm, or
94 company organized or existing under the laws of this or any other state or country; state of West
95 Virginia; governmental agency, including federal facilities; political subdivision; county
96 commission; municipal corporation; partnership; trust; estate; person or individuals acting
97 individually or as a group; or any legal entity whatever;

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

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

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

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

109 (y) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying,
110 discharging, injecting, escaping, leaching, migrating, dumping, or disposing of any contaminant
111 or regulated substance into the environment, including, without limitation, the abandonment or
112 improper discarding of barrels, containers, or any other closed receptacle containing any
113 contaminant;

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

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

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

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

127 (dd) "Secretary" means the Secretary of the Department of the Environmental Protection
128 or such other person to whom he or she has delegated authority or duties in accordance with §22-
129 1-6 or §22-1-8 of this code;

130 ~~(dd)~~(ee) "Site" means any property or portion thereof which contains or may contain
131 contaminants and is eligible ~~for~~ to participate in the voluntary remediation program as provided
132 under this article;

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

136 ~~(ff)~~(gg) "Voluntary remediation" means a series of measures that may be self-initiated by
137 a person to identify and address potential sources of contamination of property and to establish
138 that the property complies with applicable remediation standards.

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

1 ~~Within one year after the effective date of this section, t~~The director ~~Secretary~~, in
2 accordance with chapter twenty-nine-a of this code, shall propose, and subsequently may amend,
3 suspend, or rescind, rules that do the following:

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

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

9 (c) Establish procedures for community notification and involvement;

10 (d) Establish risk-based standards for remediation;

11 (e) Establish standards for the remediation of property;

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

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

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

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

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

23 (5) Address the use of probabilistic modeling;

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

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

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

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

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

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

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

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

47 (j) Establish any other rules necessary to carry out the requirements and the legislative
48 intent of this act.

§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.

1 (a) Any site is eligible for participation in the voluntary remediation program, except those
2 sites subject to a ~~federal environmental protection agency~~ unilateral enforcement order, under §§
3 104 through §106 of the "Comprehensive Environmental Response, Compensation and Liability
4 Act" (CERCLA), 94 Stat. 2779, 42 U.S.C. ~~§§9604-9604-9006, as amended,~~ or which have been
5 listed or proposed to be listed by the United States ~~e~~Environmental p~~r~~o~~t~~e~~c~~t~~i~~o~~n~~ ~~a~~g~~e~~n~~c~~y~~
6 ("USEPA") on the priorities list of Title I of said act, or which is subject to a unilateral enforcement
7 order under §3008 and §7003 of the "Resource Conservation Recovery Act" ("RCRA"), 42 U.S.C.
8 § 6928 or § 6973, or which is subject to any unilateral enforcement order for corrective action
9 under this chapter: *Provided*, That the release which is subject to remediation was not created
10 through gross negligence or willful misconduct. ~~In order to participate in the voluntary remediation~~
11 ~~program, a person must submit an application to the director and enter into a voluntary~~
12 ~~remediation agreement as set forth in section seven of this article.~~~~~~~~~~~~

13 (b) Any person who desires to participate in the voluntary remediation program must
14 submit to the ~~division~~ Department an application and an application fee established by the ~~director~~
15 Secretary. The application shall be on a form provided by the ~~director~~ Secretary and contain the
16 following information: The applicant's name, address, financial and technical capability to perform
17 the voluntary remediation, a general description of the site, a site assessment of the actual or

18 potential contaminants ~~made~~ prepared by a licensed remediation specialist, and all other
19 information required by the ~~director~~ Secretary.

20 (c) The ~~director~~ Secretary shall promulgate a legislative rule establishing a reasonable
21 application fee. Fees collected under this section shall be deposited to the credit of the ~~voluntary~~
22 ~~Remediation Fund~~ in the State Treasury as established in §22-22-6 of this code ~~section six of~~
23 ~~this article~~.

24 (d) Information obtained by the ~~division~~ Department under this article shall be available to
25 the public, unless the ~~director~~ Secretary certifies such information to be confidential. The ~~director~~
26 Secretary may make such certification where any person shows, to the satisfaction of the ~~director~~
27 Secretary, that the information or parts thereof, if made public, would divulge methods, processes,
28 or activities entitled to protection as trade secrets. In submitting data under this article, any person
29 required to provide such confidential data may designate the data which that person believes is
30 entitled to protection under this section and submit such designated data separately from other
31 data submitted under this article. This designation request shall be made in writing. Any person
32 who divulges or discloses any information entitled to protection under this section is guilty of a
33 misdemeanor and, upon conviction thereof, shall be fined not more than \$5,000 or imprisoned in
34 a county jail for not more than one year, or both fined and imprisoned.

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

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

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

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

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

44 (g) The ~~director~~ Secretary shall act upon all applications within ~~forty-five~~ 45 days of receipt,
45 unless an extension of time is mutually agreed to and confirmed in writing. If an application is
46 returned by the ~~director~~ Secretary because it is not complete or accurate, the ~~director~~ Secretary
47 shall provide the applicant a list of all information that is needed to make the application complete
48 or accurate. The applicant may resubmit an application without submitting an additional
49 application fee.

50 (h) If the ~~director~~ Secretary rejects the application, then he or she shall notify the applicant
51 that the application has been rejected and provide an explanation of the reasons for the rejection.
52 The applicant may, within ~~twenty-five~~ 25 days of rejection, indicate ~~his~~ its desire to resubmit the
53 application. Upon final determination by the ~~director~~ Secretary, if the application is rejected, the
54 ~~director~~ Secretary shall return one half of the application fee. The applicant may appeal the
55 ~~director's~~ Secretary's rejection of the application to the ~~e~~Environmental ~~q~~Quality ~~b~~Board
56 established under article ~~three, chapter twenty-two b~~ of this code §22B-3-1, et seq. of this code.

57 (i) Upon withdrawal of an application, the applicant is entitled to the refund of one half of
58 the application fee, provided the application has not been accepted by the Secretary.

§22-22-5. Brownfields Revolving Fund applicant eligibility application; loans; remediation process; brownfield remediation; eligibility; application; remediation loan; and obtaining information from director public notification.

1 (a) ~~For brownfield property,~~ Persons may be eligible for Brownfields Revolving Fund
2 moneys when any environmental remediation is undertaken pursuant to this article, ~~by a~~
3 ~~development authority or any~~ and the person ~~who~~ did not cause or contribute to the contamination
4 on the property. Persons receiving Brownfields Revolving Fund moneys shall comply with the
5 appropriate standards established by the ~~director~~ Secretary pursuant to this article and rules
6 promulgated hereunder.

7 (b) After conferring with the ~~director~~ Secretary, the person may apply to the ~~director~~
8 Secretary for a site assessment or remediation loan under ~~section six of this article~~ §22-22-6 of

9 ~~this code. A site assessment must be conducted to establish existing contamination of the site.~~
10 An application for ~~brownfield remediation~~ the Brownfields Revolving Fund must be submitted
11 along with ~~the an~~ application fee to be established by the Secretary. ~~The procedures established~~
12 ~~for voluntary remediation set forth in section four must be followed. The director shall establish a~~
13 ~~reasonable application fee.~~

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

17 ~~(c)~~(d) Persons undertaking brownfield remediation, ~~who did not cause or contribute to the~~
18 ~~contamination of the brownfield site, may obtain all information relating to contamination at the~~
19 ~~site in the possession of the director prior to engaging in a site assessment~~ receiving Brownfields
20 Revolving Fund moneys to perform remediation and revitalization of brownfield sites shall comply
21 with the following public notice and involvement requirements:

22 (1) Submit a notice of intent to remediate to the Department. This notice shall provide, to
23 the extent known, a brief description of the location of the site; a listing of the contaminants
24 involved; and the proposed remediation measures. The Department shall publish an
25 acknowledgment noting the receipt of the notice of intent in a Department publication of general
26 circulation. At the time a notice of intent to remediate a site is submitted to the Department, a copy
27 of such notice shall be provided to the municipality and the county in which the site is located,
28 and a summary of the notice of intent shall be published in a newspaper of general circulation
29 serving the area in which the site is located.

30 (2) Provide a thirty-day public, county, and municipal comment period for the notice
31 required by this subsection during which the public, county, and municipality can request to be
32 involved in the development of the remediation and reuse plans for the site. If requested by the
33 public, county, municipality, or the Secretary, the person undertaking the remediation shall

34 develop and implement a public involvement program plan which meets the requirements set
35 forth by the Secretary.

36 (3) Adhere to other public notice requirements as stipulated by federal or other grantors
37 that provide moneys to the Brownfields Revolving Fund, or as provided in the rules developed by
38 the Secretary.

§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.

1 (a) There is hereby ~~created~~ reauthorized and continued in the State Treasury a special
2 revenue fund known as the Voluntary Remediation Administrative Fund. The fund shall operate
3 as a special fund whereby all deposits and payments thereto do not expire to the General
4 Revenue Fund, but shall remain in the fund and be available for expenditure in succeeding fiscal
5 years. This fund shall consist of fees collected by the ~~director~~ Secretary in accordance with the
6 provisions of this article as well as interest earned on investments made from moneys deposited
7 in the fund. Moneys from this fund shall be expended by the ~~director~~ Secretary for the
8 administration, licensing, enforcement, inspection, monitoring, planning, research, and other
9 activities required by this article.

10 The ~~director~~ Secretary shall promulgate legislative rules in accordance with the provisions
11 of ~~chapter twenty-nine-a~~ §29A-1-1 et seq. of this code establishing a schedule of voluntary
12 remediation fees applicable to persons who conduct activities subject to the provisions of this
13 article. The fees may include an appropriate assessment of other program costs not otherwise
14 attributable to any specific site but necessary for the administrative activities required to carry out
15 the provisions of this article.

16 (b) There is hereby ~~created~~ reauthorized and continued in the State Treasury a special
17 revenue fund known as the Brownfields Revolving Fund. The fund shall be comprised of moneys
18 allocated to the state by the federal government expressly for the purposes of establishing and

19 maintaining a state brownfields redevelopment revolving fund, all receipts from loans made from
20 the fund, any moneys appropriated by the Legislature, all income from the investment of moneys
21 held in the fund, and all other sums designated for deposit to the fund from any source, public or
22 private. The fund shall operate as a special fund whereby all deposits and payments thereto do
23 not expire to the General Revenue Fund, but shall remain in the account and be available for
24 expenditure in succeeding fiscal years. Moneys in the fund, to the extent that moneys are
25 available, shall be used ~~solely~~ to make loans to persons to finance site assessments and
26 remediation of eligible brownfield sites and such other activities as authorized by any federal grant
27 received or any legislative appropriation: *Provided*, That moneys in the fund may be utilized to
28 defray those costs incurred by the ~~division~~ Department in administering the provisions of this
29 subsection. The ~~director~~ Secretary shall promulgate rules in accordance with the provisions of
30 ~~chapter twenty-nine-a~~ §29A-1-1 et seq. of this code, to govern the disbursement of moneys from
31 the fund, and establish a state brownfields redevelopment assistance program to direct the
32 distribution of loans from the fund, and establish the interest rates and repayment terms of such
33 loans: *Provided, however*, That amounts in the fund, ~~other than those~~ appropriated by the federal
34 ~~government~~ West Virginia Legislature, and which are found from time to time to exceed the
35 amount needed for the purposes set forth in this article, may be transferred to other accounts or
36 funds and redesignated for other purposes through appropriations of the Legislature. Moneys
37 from any other source, public or private, shall remain in the fund.

38 In order to carry out the administration and management of the fund, the ~~division~~
39 Department is authorized to employ officers, agents, advisors, and consultants including
40 attorneys, financial advisors, engineers, other technical advisors, and public accountants and, not
41 withstanding any provisions of this code to the contrary, to determine their duties and
42 compensation without the approval of any other agency or instrumentality.

§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.

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

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

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

9 (c) A voluntary remediation agreement must provide for cost recovery of all reasonable
10 costs incurred by the ~~division~~ Department in review and oversight of the person's work plan and
11 reports as a result of field activities or attributable to the voluntary remediation agreement, which
12 are in excess of the fees submitted by the applicant along with a schedule of payments;
13 appropriate tasks, deliverables and schedules for performance of the remediation; a listing of all
14 statutes and rules for which compliance is mandated; a description of any work plan or report to
15 be submitted for review by the ~~director~~ Secretary, including a final report that provides all
16 information necessary to verify that all work contemplated by the agreement has been completed;
17 the licensed remediation specialist's supervision of remediation contractors; and a listing of the
18 technical standards to be applied in evaluating the work plans and reports, with reference to the
19 proposed future land use to be achieved. The voluntary remediation agreement may also provide
20 for alternate dispute resolutions between the parties to the agreement, including, but not limited
21 to, arbitration or mediation of any disputes under this agreement;

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

26 (e) Upon acceptance of an application, the ~~director~~ Secretary and the applicant shall
27 develop a remediation agreement. If an agreement is not reached between the applicant and the
28 ~~director~~ Secretary on or before the ~~thirty-first~~ 31st day after the application has been accepted,
29 either party may withdraw from negotiations. Should this occur, the agency retains the application
30 fee. The applicant may appeal the failure to reach agreement to the ~~e~~Environmental ~~q~~Quality
31 ~~b~~Board as established under ~~article three, chapter twenty-two-b of this code~~ §22B-3-1, et seq. of
32 this code. By mutual agreement, when it becomes impractical to reach an agreement within ~~thirty-~~
33 ~~one~~ 31 days, the time limit may be extended in writing; and

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

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

1 After signing a voluntary remediation agreement, the person undertaking remediation shall
2 prepare and submit the appropriate work plans and reports to the ~~director~~ Secretary. The ~~director~~
3 Secretary shall review and evaluate the work plans and reports for accuracy, quality, and
4 completeness. The ~~director~~ Secretary may approve a voluntary remediation work plan or report
5 or disapprove and notify the person of additional information needed to obtain approval.

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

1 The person undertaking remediation may, in their sole discretion, terminate the
2 agreement as provided by the terms of the agreement and by giving ~~fifteen~~ 15 days advance
3 written notice of termination. Only those costs incurred or obligated by the ~~director~~ Secretary

4 before notice of termination of the agreement are recoverable, if the agreement is terminated. The
5 termination of the agreement does not affect any right the ~~director~~ Secretary may have under any
6 other law to recover costs. The person undertaking the remediation must pay the ~~division's~~
7 Department's costs associated with the voluntary remediation within thirty-one days after
8 receiving notice that the costs are due and owing. The ~~director~~ Secretary may bring an action in
9 Kanawha County circuit court or in the circuit court in the county wherein the property is situated
10 to recover the amount owed to the ~~division~~ Department and reasonable legal expenses.

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

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

5 (b) The ~~director~~ Secretary shall make periodic inspections at sites subject to this article.
6 After an inspection is made, a report shall be filed with the ~~director~~ Secretary and a copy shall be
7 provided to the person who is responsible pursuant to the voluntary agreement for remediation
8 activities. The reports shall not disclose any confidential information protected under the
9 provisions of ~~subsection (d), section four of this article~~ §22-22-4(d) of this code. The inspection
10 reports shall be available to the public in accordance with the provisions of ~~article one, chapter~~
11 ~~twenty-nine b of this code~~ §29B-1-1, et seq. of this code.

12 (c) The ~~director~~ Secretary may, upon presentation of proper credentials, enter any
13 building, motor vehicle, property, premises, or site where brownfield or voluntary remediation
14 activities are being or have been performed and take samples of wastes, soils, air, surface water
15 and groundwater. In taking such samples, the ~~director~~ Secretary may utilize such sampling
16 methods as are necessary in exercising good scientific technique. Following the taking of any
17 sample, the ~~director~~ Secretary shall give the person responsible in the voluntary agreement for
18 remediation activities a receipt describing the sample obtained and if requested, a portion of each

19 sample equal in volume or weight to the portion retained. The ~~director~~ Secretary shall promptly
20 provide a copy of any analysis made to the responsible person named in the voluntary agreement.

21 (d) Upon presentation of proper credentials, the ~~director~~ Secretary shall be given access
22 to all records relating to a ~~brownfield~~ or voluntary remediation.

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

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

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

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

7 (2) The principal business address of the applicant;

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

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

12 (5) The examination fee; and

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

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

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

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

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

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

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

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

46 (j) The ~~director~~ Secretary is authorized to revoke a license; suspend a license for not more
47 than five years; or impose lesser sanctions as may be appropriate for acts or omissions in violation
48 of this article.

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

1 (a) If the ~~director~~ Secretary, upon inspection, investigation or through other means
2 observes, discovers, or learns that a licensed remediation specialist has violated the provisions
3 of this article or any rules promulgated hereunder, the ~~director~~ Secretary may:

4 (1) Issue an order stating with reasonable specificity the nature of the violation and
5 requiring compliance immediately or within a specified time. An order under this section includes,
6 but is not limited to, orders suspending or revoking licenses, orders requiring a person to take
7 remedial action or cease and desist orders; or

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

10 (b) Any person issued an order may file a request for reconsideration with the ~~director~~
11 Secretary within ~~seven~~ 7 days of the receipt of the order. The ~~director~~ Secretary shall conduct a
12 hearing on the merits of the order within ~~ten~~ 10 days of the filing of the request for reconsideration.
13 The filing of a notice of request for reconsideration does not stay or suspend the execution or
14 enforcement of the order.

15 (c) Any licensed remediation specialist who fraudulently misrepresents that work has been
16 completed and such action results in an unjustified and inexcusable disregard for the safety of
17 others, thereby placing another in imminent danger or contributing to ongoing harm to the
18 environment, he or she shall be guilty of a felony and, upon conviction thereof, shall be fined not
19 more than \$50,000 or imprisoned not less than one nor more than two years, or both such fine
20 and imprisonment.

21 (d) If any person associated with remediation of a brownfield or voluntary remediation site
22 engages in fraudulent acts or representations to the ~~division~~ Department, he or she shall be guilty
23 of a felony and, upon conviction thereof, shall be fined not more than \$50,000 or imprisoned not
24 less than one nor more than two years, or both.

§22-22-13. Certificate of completion.

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

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

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

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

1 (a) The ~~director~~ Secretary shall establish by rule, criteria for deed recordation of land-use
2 covenants and containing all necessary deed restrictions. The ~~director~~ Secretary shall cause all
3 land-use covenants to appear in the chain of title by deed to be properly recorded in the office of
4 the county clerk where the remediation site is located. If institutional and engineering controls are
5 used, in whole or in part, to achieve a remediation standard, the ~~director~~ Secretary shall direct
6 that a land-use covenant be applied. The covenant shall include whether residential or

7 nonresidential exposure factors were used to comply with the site-specific standard. The covenant
8 shall contain a provision relieving the person who undertook the remediation and subsequent
9 successors and assigns from all civil liability to the state as provided under this article and shall
10 remain effective as long as the property complies with the applicable standards in effect at the
11 time the covenant was issued.

12 (b) Whoever knowingly violates a land-use covenant by converting nonresidential
13 property to residential property is guilty of a felony, and, upon conviction thereof, shall be fined
14 not more than \$25,000, imprisoned for not more than five years, or both.

§22-22-15. Reopeners.

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

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

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

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

16 (d) The release occurred after the effective date of this article on a site not used for
17 industrial activity prior to the effective date of this article; the remedy relied, in whole or in part,

18 upon institutional or engineering controls instead of treatment or removal of contamination; and
19 treatment, removal or destruction has become technically and economically practicable; or

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

22 In the event that any of the foregoing circumstances occur, the remediation agreement will
23 be reopened and revised to the extent necessary to return the site to its previously agreed to state
24 of remediation or other appropriate standard.

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

1 If an assessor in any county becomes aware of a change of remediated property use from
2 nonresidential property to residential, the assessor shall check the land record of the county to
3 ascertain if a land-use covenant appears to have been violated. Should it appear that a violation
4 has occurred, the assessor shall notify the ~~director~~ Secretary in writing of the suspected violation.
5 If any citizen becomes aware of a change of property use from nonresidential to residential, the
6 citizen may check the land record of the county to ascertain if a land use covenant appears to
7 have been violated and may notify the ~~director~~ Secretary in writing. The ~~director~~ Secretary shall
8 then investigate and proceed with any necessary enforcement action.

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

1 [Repealed.]

§22-22-18. Environmental liability protection.

1 (a) Any person demonstrating compliance with the applicable standards established in
2 section three of this article, whether by remediation or where the site assessment shows that the
3 contamination at the site meets applicable standards, shall be relieved of further liability for the
4 remediation of the site under this chapter. Contamination identified in the remediation agreement
5 submitted to and approved by the ~~division~~ Department shall not be subject to citizen suits or

6 contribution actions. The protection from further remediation liability provided by this article
7 applies to the following persons:

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

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

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

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

15 (5) A remediation contractor;

16 (6) A licensed remediation specialist; and

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

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

24 (c) The Secretary may, consistent with programs developed under the federal acts, make
25 a determination to limit the liability of lenders, innocent purchasers or landowners, de minimis
26 contributors or others who have grounds to claim limited responsibility for a containment or
27 cleanup that may be required pursuant to the Hazardous Waste Management Act (§22-18-1, et
28 seq. of this code), the Water Pollution Control Act (§22-11-1, et seq. of this code), the
29 Groundwater Protection Act (§22-12-1, et seq. of this code), or any other applicable law.

30 (d) A bona fide prospective purchaser shall not be held liable for a containment or cleanup
31 that may be required at a brownfield site pursuant to the Hazardous Waste Management Act (§22-

32 18-1, et seq. of this code), the Water Pollution Control Act (§22-11-1, et seq. of this code), the
33 Groundwater Protection Act (§22-12-1, et seq. of this code), or any other applicable law, if:

34 (1) The person did not cause, contribute, or consent to the release or threatened release;

35 (2) The person is not liable or potentially liable through any direct or indirect familial
36 relationship or any contractual, corporate, or financial relationship or is not the result of a
37 reorganization of a business entity that was potentially liable;

38 (3) The person exercises appropriate care with respect to hazardous substances found at
39 the facility by taking reasonable steps to stop any continuing release, prevent any threatened
40 future release, and prevent or limit human, environmental, or natural resource exposure to any
41 previously released hazardous substances; and

42 (4) The person does not impede the performance of any response action.

43 (e) An innocent land owner who holds title, security interest or any other interest in a
44 brownfield site shall not be held liable for a containment or cleanup that may be required at a
45 brownfield site pursuant to the Hazardous Waste Management Act (§22-18-1, et seq. of this
46 code), the Water Pollution Control Act (§22-11-1, et seq. of this code), the Groundwater Protection
47 Act (§22-12-1, et seq. of this code), or any other applicable law if:

48 (1) The person did not cause, contribute, or consent to the release or threatened release;

49 (2) The person is not liable or potentially liable through any direct or indirect familial
50 relationship or any contractual, corporate, or financial relationship or is not the result of a
51 reorganization of a business entity that was potentially liable;

52 (3) The person made all appropriate inquiries into the previous uses of the facility in
53 accordance with generally accepted good commercial and customary standards and practices,
54 including those established by federal law;

55 (4) The person exercises appropriate care with respect to hazardous substances found at
56 the facility by taking reasonable steps to stop any continuing release, prevent any threatened

57 future release, and prevent or limit human, environmental, or natural resource exposure to any
58 previously released hazardous substances;

59 (5) The person does not impede the performance of any response action; and either

60 (6) At the time the person acquired the interest, he did not know and had no reason to
61 know that any hazardous substances had been or were likely to have been disposed of on, in, or
62 at the site, or

63 (7) The person is a government entity that acquired the site by escheat or through other
64 involuntary transfer or acquisition.

65 (f) A person that owns real property that is contiguous to or otherwise similarly situated
66 with respect to, and that is or may be contaminated by a release or threatened release of a
67 hazardous substance from real property that is not owned by that person shall not be considered
68 liable for a containment or cleanup that may be required pursuant to the Hazardous Waste
69 Management Act (§22-18-1, et seq. of this code), the Water Pollution Control Act (§22-11-1, et
70 seq. of this code), the Groundwater Protection Act (§22-12-1, et seq. of this code), or any other
71 applicable law if the person did not cause, contribute, or consent to the release or threatened
72 release, if the person is not liable or potentially liable through any direct or indirect familial
73 relationship or any contractual, corporate, or financial relationship or is not the result of a
74 reorganization of a business entity that was potentially liable, and if such person provides full
75 cooperation, assistance and access to persons that are authorized to conduct response actions
76 at the facility from which there has been a release.

77 (g) The provisions of this section shall not otherwise limit the authority of the Secretary to
78 require any person responsible for the contamination or pollution to contain or remediate sites
79 where solid or hazardous waste or other substances have been improperly managed.

§22-22-20. Affirmative defenses.

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

- 4 (a) An act of God;
- 5 (b) An intervening act of a public agency;
- 6 (c) Migration from property owned by a third party;
- 7 (d) Actions taken or omitted in the course of rendering care, assistance or advice in
8 accordance with the environmental laws or at the direction of the ~~division~~Department;
- 9 (e) An act of a third party who was not an agent or employee of the lender, fiduciary,
10 developer, remediation contractor or development authority; or
- 11 (f) If the alleged liability for a lender, fiduciary, developer or development authority arises
12 after foreclosure, and the lender, fiduciary, developer or development authority exercised due
13 care with respect to the lender's, fiduciary's, developer's or development authority's knowledge
14 about the contaminants, and took reasonable precautions based upon such knowledge against
15 foreseeable actions of third parties and the consequences arising therefrom. A lender, fiduciary,
16 developer, remediation contractor or development authority may avoid liability by proving any
17 other defense which may be available to it.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.