

1 **H. B. 4609**

2
3 (By Delegates R. Phillips, Stowers, Varner,
4 Hall, Cann, Skaff, Rodighiero, White,
5 Craig and Boggs)

6 [Introduced February 17, 2012; referred to the

7 Committee on Energy, Industry and Labor, Economic Development and
8 Small Business then the Judiciary.]

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 (§22-11 et seq.) for compliance
15 with the mine operator's National Pollutant Discharge
16 Elimination System ("NPDES") Permit where the West Virginia
17 Department of Environmental Protection performs reclamation at
18 a bond 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:

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

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

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

1 with bonding either the entire permit area or with incremental
2 bonding, the operator shall continue bonding in that manner for the
3 term of the permit.

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

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

1 Virginia whose duty it is to receive and hold the deposit in the
2 name of the state in trust for the purpose for which the deposit is
3 made when the permit is issued. The operator making the deposit is
4 entitled, from time to time, to receive from the State Treasurer,
5 upon the written approval of the secretary, the whole or any
6 portion of any cash, securities or certificates so deposited, upon
7 depositing with him or her in lieu thereof cash or other securities
8 or certificates of the classes specified in this subsection having
9 value equal to or greater than the sum of the bond.

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

16 (d) The secretary may accept the bond of the applicant itself
17 without separate surety when the applicant demonstrates to the
18 satisfaction of the secretary the existence of a suitable agent to
19 receive service of process and a history of financial solvency and
20 continuous operation sufficient for authorization to self-insure.

21 (e) It is unlawful for the owner of surface or mineral rights
22 to interfere with the present operator in the discharge of the
23 operator's obligations to the state for the reclamation of lands
24 disturbed by the operator.

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

3 (g) (1) The Special Reclamation Fund previously created is
4 continued. The Special Reclamation Water Trust Fund is created
5 within the State Treasury into and from which moneys shall be paid
6 for the purpose of assuring a reliable source of capital to reclaim
7 and restore water treatment systems on forfeited sites. The moneys
8 accrued in both funds, any interest earned thereon and yield from
9 investments by the State Treasurer or West Virginia Investment
10 Management Board are reserved solely and exclusively for the
11 purposes set forth in this section and section seventeen, article
12 one of this chapter. The funds shall be administered by the
13 secretary who is authorized to expend the moneys in both funds for
14 the reclamation and rehabilitation of lands which were subjected to
15 permitted surface mining operations and abandoned after August 3,
16 1977, where the amount of the bond posted and forfeited on the land
17 is less than the actual cost of reclamation, and where the land is
18 not eligible for abandoned mine land reclamation funds under
19 article two of this chapter. The secretary shall develop a long-
20 range planning process for selection and prioritization of sites to
21 be reclaimed so as to avoid inordinate short-term obligations of
22 the assets in both funds of such magnitude that the solvency of
23 either is jeopardized. The secretary may use both funds for the
24 purpose of designing, constructing and maintaining water treatment

1 systems when they are required for a complete reclamation of the
2 affected lands described in this subsection. The secretary may
3 also expend an amount not to exceed ten percent of the total annual
4 assets in both funds to implement and administer the provisions of
5 this article and, as they apply to the Surface Mine Board, articles
6 one and four, chapter twenty-two-b of this code.

7 (2) In the event of a bond forfeiture, the permit obligations
8 and liabilities arising under the original National Pollutant
9 Discharge Elimination System permit, issued to the mine operator
10 pursuant to the Water Pollution Control Act (W.Va. Code §22-11 et
11 seq.), remain with the mine operator and do not pass to the
12 Secretary; these obligations and any corresponding liabilities
13 arising under the Water Pollution Control Act (W.Va. Code §22-11 et
14 seq.) remain with the mine operator.

15 (3) Reclamation efforts undertaken by the secretary, including
16 the construction and maintenance of water pollution treatment
17 systems, shall be considered construction activities subject to the
18 requirements of West Virginia's National Pollutant Discharge
19 Elimination System General Permit.

20 (4) The jurisdiction of the West Virginia Department of
21 Environmental Protection over a bond forfeiture site terminates
22 upon the completion of the land reclamation contract: *Provided,*
23 That jurisdiction does not terminate over the area necessary for
24 the operation and maintenance of water treatment facilities until

1 such time as the water treatment facilities are removed on sites
2 where the secretary has an obligation to obtain or maintain a
3 National Pollutant Discharge Elimination Permit.

4 (5) (A) A tax credit shall be granted against the tax imposed
5 by subsection (i) of this section to any mine operator who performs
6 reclamation or remediation at a bond forfeiture site which
7 otherwise would have been reclaimed using funds from the special
8 reclamation fund or special reclamation water trust fund. The
9 amount of credit shall be determined as provided in this section.

10 (B) The amount of reclamation tax credit granted under this
11 subsection shall be equal to the amount that the Tax Commissioner
12 determines, based on the project costs, as shown in the records of
13 the secretary, that would have been spent from the special
14 reclamation fund or special reclamation water trust fund to
15 accomplish the reclamation or remediation performed by the mine
16 operator, including expenditures for water treatment.

17 (C) To claim the credit, the mine operator shall from time to
18 time file with the Tax Commissioner a written application seeking
19 the amount of the credit earned. Within thirty days of receipt of
20 the application, the Tax Commissioner shall issue a certification
21 of the amount of tax credit, if any, to be allocated to the
22 eligible taxpayer. Should the amount of the credit certified be
23 less than the amount applied for, the Tax Commissioner shall set
24 forth in writing the reason for the difference. Should no

1 certification be issued within the thirty-day period, the
2 application will be deemed certified. Any decision by the Tax
3 Commissioner is appealable pursuant to the provisions of the "West
4 Virginia Tax Procedure and Administration Act" set forth in article
5 ten, chapter eleven of the code. Applications for certification of
6 the proposed tax credit shall contain such information and be in
7 such detail and in such form as required by the Tax Commissioner.

8 (h) The secretary may propose rules for legislative approval
9 in accordance with article three, chapter twenty-nine-a of this
10 code to carry out the policy and purposes of this article, to
11 provide any necessary clarification of the provisions of this
12 section and to efficiently provide for the general administration
13 of this section. The Tax Commissioner may promulgate rules for
14 legislative approval pursuant to the provisions of article three,
15 chapter twenty-nine-a of this code to carry out the purposes of
16 this section.

17 ~~(h)~~ (i) (1) For tax periods commencing on and after July 1,
18 2009, every person conducting coal surface mining shall remit a
19 special reclamation tax of fourteen and four-tenths cents per ton
20 of clean coal mined, the proceeds of which shall be allocated by
21 the secretary for deposit in the Special Reclamation Fund and the
22 Special Reclamation Water Trust Fund. The tax shall be levied upon
23 each ton of clean coal severed or clean coal obtained from refuse
24 pile and slurry pond recovery or clean coal from other mining

1 methods extracting a combination of coal and waste material as part
2 of a fuel supply. Beginning with the tax period commencing on July
3 1, 2009, and every two years thereafter, the special reclamation
4 tax shall be reviewed by the Legislature to determine whether the
5 tax should be continued: *Provided*, That the tax may not be reduced
6 until the Special Reclamation Fund and Special Reclamation Water
7 Trust Fund have sufficient moneys to meet the reclamation
8 responsibilities of the state established in this section.

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

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

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

21 (B) Determine the feasibility of creating an incremental
22 bonding program by which operators can post a reclamation bond for
23 those areas actually disturbed within a permit area, but for less
24 than all of the proposed disturbance and obtain incremental release

1 of portions of that bond as reclamation advances so that the
2 released bond can be applied to approved future disturbance; and

3 (C) Determine the feasibility for sites requiring water
4 reclamation by creating a separate water reclamation security
5 account or bond for the costs so that the existing reclamation bond
6 in place may be released to the extent it exceeds the costs of
7 water reclamation.

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

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

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

4 ~~(k)~~ (l) The Tax Commissioner shall provide to the secretary a
5 quarterly listing of all persons known to be delinquent in payment
6 of the special reclamation tax. The secretary may take the
7 delinquencies into account in making determinations on the
8 issuance, renewal or revision of any permit.

9 ~~(l)~~ (m) The Tax Commissioner shall deposit the moneys
10 collected with the Treasurer of the State of West Virginia to the
11 credit of the Special Reclamation Fund and Special Reclamation
12 Water Trust Fund.

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

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

NOTE: The purpose of this bill is to clarify that a mine operator's obligations under the West Virginia Water Pollution Control Act (§22-11 et seq.) do not pass to the West Virginia Department of Environmental Protection at bond forfeiture sites where the West Virginia Department of Environmental Protection completes reclamation. The bill also clarifies that the West Virginia Department of Environmental Protection's reclamation activities at bond forfeiture sites shall be considered construction activities. Finally, the bill establishes a tax incentive for mine operators who agree to reclaim bond forfeiture sites.

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