

COMMITTEE SUBSTITUTE

FOR

H. B. 2352

(BY DELEGATE(S) R. PHILLIPS, STOWERS, SKAFF AND BOGGS)

(Originating in the House Committee on the Judiciary)

[March 29, 2013]

A BILL to amend and reenact §22-3-11 of the Code of West Virginia, 1931, as amended, relating to clarifying that the West Virginia Department of Environmental Protection does not assume a mine operator's obligations or liabilities under the Water Pollution Control Act for compliance with the mine operator's National Pollutant Discharge Elimination System ("NPDES") Permit where the West Virginia Department of Environmental Protection performs reclamation at a bond forfeiture site; clarifying that reclamation efforts undertaken by the West Virginia Department

of Environmental Protection at bond forfeiture sites are considered construction activities; and providing tax incentives for mine operators who reclaim bond forfeiture sites.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 3. SURFACE COAL MINING AND RECLAMATION ACT.

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

1 (a) After a surface mining permit application has been
2 approved pursuant to this article, but before a permit has been
3 issued, each operator shall furnish a penal bond, on a form to be
4 prescribed and furnished by the secretary, payable to the State of
5 West Virginia and conditioned upon the operator faithfully
6 performing all of the requirements of this article and of the
7 permit. The penal amount of the bond shall be not less than
8 \$1,000 nor more than \$5,000 for each acre or fraction of an acre:
9 *Provided,* That the minimum amount of bond furnished for any
10 type of reclamation bonding shall be \$10,000. The bond shall
11 cover: (1) The entire permit area; or (2) that increment of land

12 within the permit area upon which the operator will initiate and
13 conduct surface mining and reclamation operations within the
14 initial term of the permit. If the operator chooses to use
15 incremental bonding, as succeeding increments of surface
16 mining and reclamation operations are to be initiated and
17 conducted within the permit area, the operator shall file with the
18 secretary an additional bond or bonds to cover the increments in
19 accordance with this section: *Provided, however,* That once the
20 operator has chosen to proceed with bonding either the entire
21 permit area or with incremental bonding, the operator shall
22 continue bonding in that manner for the term of the permit.

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

27 (c) (1) The form of the bond shall be approved by the
28 secretary and may include, at the option of the operator, surety
29 bonding, collateral bonding (including cash and securities),
30 establishment of an escrow account, self bonding or a
31 combination of these methods. If collateral bonding is used, the

32 operator may elect to deposit cash or collateral securities or
33 certificates as follows: Bonds of the United States or its
34 possessions of the Federal Land Bank or of the Homeowners'
35 Loan Corporation; full faith and credit general obligation bonds
36 of the State of West Virginia or other states and of any county,
37 district or municipality of the State of West Virginia or other
38 states; or certificates of deposit in a bank in this state, which
39 certificates shall be in favor of the department. The cash deposit
40 or market value of the securities or certificates shall be equal to
41 or greater than the penal sum of the bond. The secretary shall,
42 upon receipt of any deposit of cash, securities or certificates,
43 promptly place the same with the Treasurer of the State of West
44 Virginia whose duty it is to receive and hold the deposit in the
45 name of the state in trust for the purpose for which the deposit is
46 made when the permit is issued. The operator making the deposit
47 is entitled, from time to time, to receive from the State Treasurer,
48 upon the written approval of the secretary, the whole or any
49 portion of any cash, securities or certificates so deposited, upon
50 depositing with him or her in lieu thereof cash or other securities
51 or certificates of the classes specified in this subsection having
52 value equal to or greater than the sum of the bond.

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

59 (d) The secretary may accept the bond of the applicant itself
60 without separate surety when the applicant demonstrates to the
61 satisfaction of the secretary the existence of a suitable agent to
62 receive service of process and a history of financial solvency and
63 continuous operation sufficient for authorization to self insure.

64 (e) It is unlawful for the owner of surface or mineral rights
65 to interfere with the present operator in the discharge of the
66 operator's obligations to the state for the reclamation of lands
67 disturbed by the operator.

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

70 (g) (1) The Special Reclamation Fund previously created is
71 continued. The Special Reclamation Water Trust Fund is created
72 within the State Treasury into and from which moneys shall be

73 paid for the purpose of assuring a reliable source of capital to
74 reclaim and restore water treatment systems on forfeited sites.
75 The moneys accrued in both funds, any interest earned thereon
76 and yield from investments by the State Treasurer or West
77 Virginia Investment Management Board are reserved solely and
78 exclusively for the purposes set forth in this section and section
79 seventeen, article one of this chapter. The funds shall be
80 administered by the secretary who is authorized to expend the
81 moneys in both funds for the reclamation and rehabilitation of
82 lands which were subjected to permitted surface mining
83 operations and abandoned after August 3, 1977, where the
84 amount of the bond posted and forfeited on the land is less than
85 the actual cost of reclamation, and where the land is not eligible
86 for abandoned mine land reclamation funds under article two of
87 this chapter. The secretary shall develop a long-range planning
88 process for selection and prioritization of sites to be reclaimed
89 so as to avoid inordinate short-term obligations of the assets in
90 both funds of such magnitude that the solvency of either is
91 jeopardized. The secretary may use both funds for the purpose of
92 designing, constructing and maintaining water treatment systems
93 when they are required for a complete reclamation of the

94 affected lands described in this subsection. The secretary may
95 also expend an amount not to exceed ten percent of the total
96 annual assets in both funds to implement and administer the
97 provisions of this article and, as they apply to the Surface Mine
98 Board, articles one and four, chapter twenty-two-b of this code.

99 (2) In the event of a bond forfeiture, the permit obligations
100 and corresponding liabilities arising under the original National
101 Pollutant Discharge Elimination System permit, issued to the
102 mine operator pursuant to the Water Pollution Control Act
103 (W.Va. Code §22-11 et seq.), remain with the mine operator and
104 do not pass to the Secretary or other third party, including any
105 land or mineral owner. However, in the event of bond forfeiture,
106 the Secretary shall complete reclamation and ensure that
107 discharges of pollutants from the forfeited site are treated
108 pursuant to a National Pollutant Discharge Elimination System
109 permit.

110 (3) Reclamation efforts undertaken by the Secretary,
111 including the construction and maintenance of water pollution
112 treatment systems, shall be considered construction activities
113 subject to the requirements of the applicable reclamation plan.

114 (4) The jurisdiction of the secretary over a bond forfeiture
115 site terminates upon the completion of reclamation. Jurisdiction
116 does not terminate over the area necessary for the operation and
117 maintenance of water treatment facilities until the facilities are
118 removed pursuant to the National Pollutant Discharge
119 Elimination System program.

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

127 (B) The amount of a reclamation tax credit granted under
128 this subsection shall be equal to the amount that the Tax
129 Commissioner determines, based on the project costs, as shown
130 in the records of the secretary, that would have been spent from
131 the Special Reclamation Fund or Special Reclamation Water
132 Trust Fund to accomplish the reclamation or remediation
133 performed by the mine operator, including expenditures for
134 water treatment.

135 (C) To claim the credit, the mine operator shall from time to
136 time file with the Tax Commissioner a written application
137 seeking the amount of the credit earned. Within thirty days of
138 receipt of the application, the Tax Commissioner shall issue a
139 certification of the amount of tax credit, if any, to be allocated to
140 the eligible taxpayer. Should the amount of the credit certified be
141 less than the amount applied for, the Tax Commissioner shall set
142 forth in writing the reason for the difference. Should no
143 certification be issued within the thirty-day period, the
144 application will be deemed certified. Any decision by the Tax
145 Commissioner is appealable pursuant to the provisions of the
146 “West Virginia Tax Procedure and Administration Act” set forth
147 in article ten, chapter eleven of the code. Applications for
148 certification of the proposed tax credit shall contain the
149 information and be in the detail and form as required by the Tax
150 Commissioner.

151 (h) The secretary may propose rules for legislative approval
152 in accordance with article three, chapter twenty-nine-a of this
153 code to carry out the policy and purposes of this article, to
154 provide any necessary clarification of the provisions of this

155 section and to efficiently provide for the general administration
156 of this section. The Tax Commissioner may promulgate rules for
157 legislative approval pursuant to the provisions of article three,
158 chapter twenty-nine-a of this code to carry out the purposes of
159 this section.

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

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

167 (B) For tax periods commencing on and after July 1, 2012,
168 the rate of tax specified in paragraph (A) of this subdivision is
169 discontinued and is replaced by the rate of tax specified in this
170 paragraph (B). For tax periods commencing on and after July 1,
171 2012, every person conducting coal surface mining shall remit
172 a special reclamation tax of twenty-seven and nine-tenths cents
173 per ton of clean coal mined, the proceeds of which shall be
174 allocated by the secretary for deposit in the Special Reclamation

175 Fund and the Special Reclamation Water Trust Fund. Of that
176 amount, fifteen cents per ton of clean coal mined shall be
177 deposited into the Special Reclamation Water Trust Fund.

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

182 (D) Beginning with the tax period commencing on July 1,
183 2009, and every two years thereafter, the special reclamation tax
184 shall be reviewed by the Legislature to determine whether the
185 tax should be continued: *Provided*, That the tax may not be
186 reduced until the Special Reclamation Fund and Special
187 Reclamation Water Trust Fund have sufficient moneys to meet
188 the reclamation responsibilities of the state established in this
189 section.

190 (2) In managing the Special Reclamation Program, the
191 secretary shall: (A) Pursue cost-effective alternative water
192 treatment strategies; and (B) conduct formal actuarial studies
193 every two years and conduct informal reviews annually on the
194 Special Reclamation Fund and Special Reclamation Water Trust
195 Fund.

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

197 (A) Determine the feasibility of creating an alternate
198 program, on a voluntary basis, for financially sound operators by
199 which those operators pay an increased tax into the Special
200 Reclamation Fund in exchange for a maximum per-acre bond
201 that is less than the maximum established in subsection (a) of
202 this section;

203 (B) Determine the feasibility of creating an incremental
204 bonding program by which operators can post a reclamation
205 bond for those areas actually disturbed within a permit area, but
206 for less than all of the proposed disturbance and obtain
207 incremental release of portions of that bond as reclamation
208 advances so that the released bond can be applied to approved
209 future disturbance; and

210 (C) Determine the feasibility for sites requiring water
211 reclamation by creating a separate water reclamation security
212 account or bond for the costs so that the existing reclamation
213 bond in place may be released to the extent it exceeds the costs
214 of water reclamation.

215 (4) If the secretary determines that the alternative program,
216 the incremental bonding program or the water reclamation

217 account or bonding programs reasonably assure that sufficient
218 funds will be available to complete the reclamation of a forfeited
219 site and that the Special Reclamation Fund will remain fiscally
220 stable, the secretary is authorized to propose legislative rules in
221 accordance with article three, chapter twenty-nine-a of this code
222 to implement an alternate program, a water reclamation account
223 or bonding program or other funding mechanisms or a
224 combination thereof.

225 ~~(i)~~ (j) This special reclamation tax shall be collected by the
226 State Tax Commissioner in the same manner, at the same time
227 and upon the same tonnage as the minimum severance tax
228 imposed by article twelve-b, chapter eleven of this code is
229 collected: *Provided*, That under no circumstance shall the special
230 reclamation tax be construed to be an increase in either the
231 minimum severance tax imposed by said article or the severance
232 tax imposed by article thirteen of said chapter.

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

236 ~~(k)~~ (l) The Tax Commissioner shall provide to the secretary
237 a quarterly listing of all persons known to be delinquent in

238 payment of the special reclamation tax. The secretary may take
239 the delinquencies into account in making determinations on the
240 issuance, renewal or revision of any permit.

241 ~~(h)~~ (m) The Tax Commissioner shall deposit the moneys
242 collected with the Treasurer of the State of West Virginia to the
243 credit of the Special Reclamation Fund and Special Reclamation
244 Water Trust Fund.

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

249 ~~(n)~~ (o) To the extent that this section modifies any powers,
250 duties, functions and responsibilities of the department that may
251 require approval of one or more federal agencies or officials in
252 order to avoid disruption of the federal-state relationship
253 involved in the implementation of the federal Surface Mining
254 Control and Reclamation Act, 30 U. S. C. §1270 by the state, the
255 modifications will become effective upon the approval of the
256 modifications by the appropriate federal agency or official.

