

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 492

BY SENATORS SMITH AND PHILLIPS

[Passed April 10, 2021; in effect 90 days from

passage (July 9, 2021)]

1 AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §22-32-1, §22-32-2, §22-32-3, §22-32-4, §22-32-5, §22-32-6, §22-32-7, and
3 §22-32-8, all relating generally to establishing and implementing a program to
4 decommission and reclaim wind and solar electrical generation facilities upon closure;
5 making legislative findings; stating legislative purpose; providing a short title; defining
6 terms including bond; requiring the owners of wind generation facilities and solar
7 generation facilities to notify and provide certain information to the Department of
8 Environmental Protection (DEP), including dates when operations began and plans with
9 certified cost and salvage estimates for decommissioning facilities; establishing fees for
10 new and modified applications; requiring DEP to determine and assess a reclamation
11 bond based on applicant's filings and a facility's total disturbed acreage, less salvage
12 value; establishing a maximum bond value limit; requiring the owners of said facilities to
13 submit bonds payable to the state in a form and in a sum determined by the DEP,
14 conditioned on the satisfactory decommissioning; providing that owners of said facilities
15 may enter into alternative reclamation agreements after approval by the DEP; providing
16 that the DEP may modify said plans after proper notification and appeals; providing
17 exemptions from bond requirements for certain facilities including those with nameplate
18 capacities of less than 1.0 megawatts, those facilities operated by regulated public utilities
19 who can demonstrate financial integrity and stability, and those facilities with qualifying
20 pre-existing agreements or siting certificates from the PSC within specified limitations;
21 providing for administrative penalties for failure to submit decommissioning bonds and
22 agreements; providing appellate rights to the Environmental Quality Board; providing
23 transfer of ownership provisions; providing for amended plans for allowing reductions in
24 bond amounts; providing that bond submission does not absolve owners from complying
25 with other applicable regulations and requirements; providing that the PSC must condition
26 siting certificates on compliance as determined by the DEP; providing a liability shield for

27 entities in compliance to avoid double bonding; requiring the DEP to decide on
28 submissions within 90 days; establishing a Wind and Solar Decommissioning Account
29 within the State Treasury in to which fees, assessed penalties, and accrued interest must
30 be paid and held; providing that the account may only be used by the DEP to implement
31 this article and adopted rules; providing that DEP shall administer this act using existing
32 resources and the account; requiring the DEP to maintain and hold bonds or other surety
33 received; providing for the release of bonds after the DEP is satisfied property has been
34 properly decommissioned in accordance with the plan; providing for bond forfeiture when
35 a facility is not properly decommissioned, if the deficiencies are not rectified; providing that
36 the Office of Environmental Remediation or a private entity by contract may decommission
37 facilities; providing that DEP may file suit to enforce permit and plan conditions and to
38 recoup costs of reclamation; authorizing rulemaking and standardized model agreements;
39 and providing effective dates.

Be it enacted by the Legislature of West Virginia:

**ARTICLE 32. THE WEST VIRGINIA WIND AND SOLAR ENERGY FACILITY
RECLAMATION ACT.**

§22-32-1. Legislative findings and purpose.

1 (a) The Legislature finds that the State of West Virginia has an interest in assuring that
2 wind generation facilities and solar generation facilities are properly decommissioned and
3 reclaimed once the facility has been permanently closed.

4 (b) The Legislature further finds that the most efficient manner by which to protect the
5 citizens of the State of West Virginia is to require that wind generation facilities and solar
6 generation facilities secure bonding sufficient to pay for all decommissioning and reclamation
7 costs of the property on which wind generation facilities and solar generation facilities are
8 operated.

9 (c) Therefore, in view of the findings relating to the decommissioning and reclamation of
10 wind generation facilities and solar generation facilities, the Legislature declares it to be the public
11 policy of the State of West Virginia to eliminate the present danger resulting from abandoned wind
12 generation facilities and solar generation facilities and that in order to provide for the public health,
13 safety, and welfare, it is necessary to enact legislation to those ends by requiring companies that
14 construct and operate wind generation facilities and solar generation facilities to post bonds and
15 execute agreements sufficient to cover the costs of decommissioning and reclamation in the event
16 they are abandoned after closure.

§22-32-2. Short title.

1 This article shall be known and cited as The West Virginia Wind and Solar Energy Facility
2 Reclamation Act.

§22-32-3. Definitions.

1 As used in this article, unless the context requires otherwise, the following definitions
2 apply:

3 (a) "Board" means the Environmental Quality Board provided for in §22B-1-7 of this code.

4 (b) "Decommission" or "decommissioning" means:

5 (1) The removal and proper disposal of the solar generation facility and its foundation after
6 the end of the facility's useful life or abandonment; or

7 (2) The removal and proper disposal of an aboveground wind turbine tower and its
8 foundation after the end of a wind generation facility's useful life or abandonment; and

9 (3) Except as otherwise provided in §22-32-4 of this code, the removal and proper disposal
10 of buildings, equipment, cabling, electrical components, roads, or any other facilities associated
11 with a wind generation or solar generation facility; and

12 (4) Except as otherwise provided in §22-32-4 of this code, the reclamation of the surface
13 lands upon which buildings, equipment, and equipment foundations using backfill and compacting
14 of soil in order to return the surface to beneficial use and to prevent adverse hydrologic effects.

15 (c) "Department", "agency", and "DEP" mean the West Virginia Department of
16 Environmental Protection.

17 (d) "Owner" means a person who owns a wind generation or solar generation facility
18 operated in West Virginia for the generation of electricity.

19 (e) "Person" means any individual, firm, partnership, company, association, corporation,
20 limited liability company, city, town, or local governmental entity or any other state, federal, or
21 private entity, whether organized for profit or not.

22 (f) "Solar generation facility" means an installation or combination of solar panels or plates,
23 including a canopy or array, and other associated property, including appurtenant land,
24 improvements, and personal property, that are normally operated together to capture and convert
25 solar radiation to produce electricity, including flat plate, focusing solar collectors, or photovoltaic
26 solar cells, and that has a nameplate capacity, singularly or in the aggregate, greater than or
27 equal to 1.0 megawatts.

28 (g) "Wind generation facility" means any combination of a physically connected wind
29 turbine or turbines, associated prime movers, and other associated property, including
30 appurtenant land, improvements, and personal property, that are normally operated together to
31 produce electric power from wind and that have a nameplate capacity, singularly or in the
32 aggregate, greater than or equal to 1.0 megawatts.

33 (h) "Bond" means a surety bond or any other arrangement, including but not limited to
34 letters of credit and escrow accounts, that represent a financial guarantee from the owner of a
35 wind generation facility or solar generation facility to meet decommissioning requirements as
36 established in this Act.

§22-32-4. Bonding required.

1 (a) Within 12 months of a wind generation facility or solar generation facility commencing
2 commercial operation, except as provided in subsections (b) and (c) of this section, the owner of
3 a wind generation facility or solar generation facility operating in West Virginia shall:

4 (1) Notify the Department of Environmental Protection (DEP) in writing of the date that the
5 facility began commercial operation;

6 (2)(A) Submit a plan, certified by a qualified independent licensed professional engineer,
7 for decommissioning the facility to the DEP in compliance with DEP standards and technical
8 specifications including a scope of work to be completed and cost estimates for completion and
9 salvage estimates, taking into account local siting conditions; or (B) if exempt hereunder, submit
10 a copy of a properly executed and legally binding decommissioning agreement with all
11 attachments, schedules, and addendums thereto;

12 (3) Provide the DEP with any other necessary information in accordance with this article
13 and rules adopted pursuant to this article in order for the department to determine bond
14 requirements in accordance with this section; and

15 (4) Submit a fee for a new application of \$100 per megawatt of nameplate generation
16 capacity or a fee for any modification of \$50 per megawatt of nameplate generation capacity to
17 be deposited into the Wind and Solar Decommissioning Account and utilized for implementing
18 this article and its rules.

19 (b) If a wind generation facility or solar generation facility commenced commercial
20 operation before July 1, 2021, the owner of the facility shall submit to the department the
21 information required in subsection (a) of this section on or before July 1, 2022.

22 (c) If a wind generation facility or solar generation facility commenced commercial
23 operation before July 1, 2021, and the owner of the facility submitted information required by
24 subsection (a) of this section on or before July 1, 2021, the owner is not required to resubmit the
25 information.

26 (d) If a property owner and the owner of a wind generation facility or solar generation
27 facility and to the extent necessary any local governing body reach an agreement concerning: (1)
28 Alternative restoration of buildings, equipment, other associated property (including appurtenant
29 land, improvements, and personal property), cabling, electrical components, roads, or any other

30 associated facilities (instead of removal); or (2) alternative plans for reclamation of surface lands;
31 or (3) both, the agreement must be provided to the DEP for review and approval by the Cabinet
32 Secretary or his assigns. The DEP must approve or deny the alternative plan submission within
33 90 days of receipt. Decommissioning agreements which legally bind exempt parties are not
34 subject to approval or modification by DEP but are subject to review and comment by DEP.

35 (e)(1) Upon application by the wind generation facility or solar generation facility, the DEP
36 may modify a plan for decommissioning and adjust bond requirements in accordance with this
37 article.

38 (2) The DEP shall notify the owner of the facility of any modification. The owner of the wind
39 generation facility or solar generation facility may appeal a modification by the DEP of a plan for
40 decommissioning to the Environmental Quality Board within 30 days of receiving notice of the
41 modification to the plan.

42 (f) To determine the amount of a bond required in accordance with this act, the DEP shall
43 take into account the report submitted with an application and assess a bond value based upon
44 the total disturbed acreage of land upon which the wind generation or solar generation facility is
45 operated, less salvage value: *Provided*, That the amount of the bond required shall not exceed
46 the total projected future cost of decommissioning, less salvage value.

47 (g) Except as provided in subsection (i) of this section, the owner of a wind generation
48 facility or solar generation facility shall submit to the DEP a bond payable to the State of West
49 Virginia in a form acceptable by the DEP and in the sum determined by the DEP, conditioned on
50 the faithful decommissioning of the wind generation facility or solar generation facility.

51 (h)(1) Except as provided in subsection (i) of this section, if a wind generation facility or
52 solar generation facility commenced commercial operation on or before July 1, 2021, the operator
53 shall submit the decommissioning bond to the DEP on or before July 1, 2022.

54 (2) Except as provided in subsection (i) of this section, if a wind generation facility or solar
55 generation facility commenced commercial operation after July 1, 2021, the operator shall submit

56 the decommissioning bond to the DEP within one year of the date on which the wind generation
57 facility or solar generation facility first produces electricity for consumer or industrial use.

58 (i) An owner of a wind generation facility or solar generation facility is exempt from the
59 requirements of this section if:

60 (1) The facility has less than 1.0 megawatts in nameplate capacity;

61 (2) The facility is operated by a regulated public utility who can successfully demonstrate
62 to the Public Service Commission and the DEP an acceptable showing of financial integrity and
63 long-term viability; or

64 (3) The facility is legally bound by a decommissioning agreement, based upon a qualified
65 independent party and executed before the effective date of this article; or is or was granted a
66 siting certificate or other authorization to construct by the Public Service Commission, conditioned
67 upon the execution of such agreement before the effective date of this article: Such facilities are
68 exempt, unless or until the facility, is (A) found to be in breach of such agreement or such
69 agreement is found to be unenforceable, (B) sold or transferred to a party or parties not bound
70 under such agreement, or (C) substantially expanded in total disturbed acreage.

71 (j)(1) If the owner of the wind generation facility or solar generation facility fails to submit
72 a decommissioning bond acceptable to the DEP or the properly executed and legally binding
73 decommissioning agreement within the time frame required by this section, the DEP shall provide
74 notice to the facility owner. If, after 30 days, the owner of a wind generation facility or solar
75 generation facility has not submitted a decommissioning bond or such agreement, the DEP may
76 assess an administrative penalty of not more than \$10,000 for the first day of violation and may
77 assess an additional administrative penalty of not more than \$500 for each day the failure to
78 submit the decommissioning bond continues.

79 (2) The owner of the wind generation facility or solar generation facility may appeal a
80 penalty assessment to the Environmental Quality Board within 30 days after receipt of written
81 notice of the penalty. The provisions of §22B-1-1 *et seq.* of this code shall apply to such appeals.

82 (k) If the owner of a bonded wind generation facility or solar generation facility transfers
83 ownership of the facility to a successor owner, the first owner's bond must be released after 90
84 days. The new owner of a bonded facility shall submit any necessary bond within 90 days after
85 transfer of ownership or be subject to penalties in accordance with this section. The new owner
86 of an unbonded facility shall submit any necessary bond within 90 days after transfer of ownership
87 or be subject to penalties in accordance with this section.

88 (l) Once every five years, the owner of a wind generation facility or solar generation facility
89 may submit an amended plan for the DEP's approval. As part of the submission, the owner of a
90 wind generation facility or solar generation facility may also apply to the DEP for a reduction in
91 the amount of the decommissioning bond applicable to the wind energy facility or solar generation
92 facility. The owner's application to the DEP must include written evidence of a reduction in the
93 total disturbed acreage upon which the facility is sited and a modification fee of \$50 per megawatt
94 of nameplate generation capacity.

95 (m) Submitting a bond or a properly executed and legally binding decommissioning
96 agreement in accordance with this section does not absolve the owner of a wind generation facility
97 or solar generation facility from complying with all other applicable laws, rules, regulations, and
98 requirements applicable to a wind generation facility or solar generation facility.

99 (n) The Public Service Commission of West Virginia shall condition all siting certificates
100 issued on full compliance, as determined by the DEP, with the provisions of this article and the
101 rules promulgated hereunder and shall not require further decommission bonding. Entities subject
102 to and in compliance with this article shall not be subjected to any municipal, county, or local
103 political subdivision's code, ordinances, rules, or regulations including additional decommission
104 bonding.

105 (o) DEP shall issue a decision approving, approving with modifications, or denying an
106 application, plan, amended plan, modification, or bond within 90 days of receipt.

107 (p) Any person adversely affected by a decision of DEP to approve or deny a
108 decommissioning plan; establish the amount of a decommissioning bond; approve or deny an
109 application to modify a decommissioning plan or bond; grant or release a decommissioning bond;
110 or to forfeit a decommissioning bond may appeal that decision to the Environmental Quality Board
111 and thereafter to the appropriate court in accordance with the provisions of §22B-1-1, *et seq* of
112 this code.

§22-32-5. Wind and solar decommissioning account, bonds to be held.

1 (a) This article establishes a Wind and Solar Decommissioning Account within the State
2 Treasury. There must be paid into the account:

- 3 (1) Fees and penalties collected in accordance with the article; and
- 4 (2) Interest income earned on the account.

5 (b)(1) Money in the account may only be used by the Department of Environmental
6 Protection (DEP) in implementing this article and rules adopted pursuant to this article.

7 (2) The DEP shall administer this program using existing resources and money in the
8 account.

9 (c) The DEP shall maintain and hold bonds or other surety received by the DEP as
10 authorized by this article for use in accordance with this article.

§22-32-6. Bond release.

1 (a)(1) Subject to subdivision (2) of this subsection, the Department of Environmental
2 Protection (DEP) shall release the bond if it is satisfied that an owner has properly
3 decommissioned a wind generation facility or solar generation facility in accordance with the plan
4 required by this article.

5 (2) At any time, an owner of a wind generation facility or solar generation facility may
6 petition the DEP for release of the bond, and the DEP shall reply with a determination within 90
7 days.

8 (b) If the owner of a wind generation facility or solar generation facility fails to properly
9 decommission a wind generation facility or solar generation facility and has not commenced
10 action to rectify deficiencies within 90 days after notification by the DEP, the DEP shall cause the
11 bond to be forfeited. The DEP, through its Office of Environmental Remediation or by contract
12 with a private entity, may take any necessary actions to decommission the wind generation facility
13 or solar generation facility. Upon completion, the DEP may file suit to enforce the permit
14 conditions, plans, and agreements to recoup the cost of decommissioning and reclamation in the
15 circuit court of Kanawha County or in the circuit court of the county in which the wind generation
16 facility or solar generation facility is located.

§22-32-7. Rulemaking.

1 The Department of Environmental Protection (DEP) may promulgate such emergency,
2 interpretive, legislative, and procedural rules as the secretary deems to be useful or necessary to
3 carry out the purpose of this article and to implement the intent of the Legislature in accordance
4 with the provisions of §29A-3-1 *et seq.* of this code, prescribing:

5 (a) Standards and procedures for reclamation, submission of applications and
6 agreements, and reasonable bonds with good and sufficient surety by the owners of wind
7 generation facilities and solar generation facilities;

8 (b) The collection of fees and penalties in accordance with this article;

9 (c) Criteria and the process for releasing a bond in accordance with this article;

10 (d) The DEP's use of a bond in the event that the owner of a wind generation facility or
11 solar generation facility fails to decommission a wind generation facility or solar generation facility;

12 (e) Information required by the department to determine bond requirements in accordance
13 with this article; and

14 (f) Any additional requirements to ensure compliance with this article.

§22-32-8. Decommissioning agreements.

1 Decommissioning agreements entered by wind and solar facilities not exempted from this
2 Act shall address, at a minimum:

3 (a) The term and scope of the agreement, including access and easement rights for
4 decommissioning activities thereunder;

5 (b) The establishment of a bond or fund for decommissioning activities; provisions
6 governing the same; initial balances; and whether an escrow agreement is required for the fund;

7 (c) The requirement to review, amend, and restate the decommissioning agreement every
8 five years and adjust the required balance of the bond or fund for decommissioning activities;

9 (d) The Department of Environmental Protection’s right to review, modify, and approve the
10 independent third-party’s plan: *Provided*, that the Department of Environmental Protection’s
11 approval of an qualified independent third-party evaluation shall not be unreasonably withheld;

12 (e) Industry standards or citations to the same to be met for decommissioning wind and
13 solar facilities, including a statement of the restoration goal and the treatment of abandoned
14 equipment on owned or leased property;

15 (f) The process for making claims and disbursements under the agreement’s
16 decommissioning fund;

17 (g) The termination of the decommissioning agreement following the completion of
18 decommissioning activities;

19 (h) Required notices;

20 (i) The assignment of rights and obligations under the agreement; and

21 (j) Force majeure provisions excusing performance or delays in performance due to fire,
22 earthquake, flood, tornado, disasters, or act of God, terrorism, pandemic, change of law, or any
23 other cause beyond a party’s control.

24 The secretary of the Department of Environmental Protection may propose rules for
25 legislative approval in accordance with the provisions of chapter 29A of this code establishing a
26 model decommissioning agreement for wind and solar facilities governed under this act.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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Chairman, Senate Committee

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Chairman, House Committee

Originated in the Senate.

In effect 90 days from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

The within this the.....
Day of, 2021.

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Governor