

# **WEST VIRGINIA LEGISLATURE**

## **2022 REGULAR SESSION**

**Introduced**

### **House Bill 4657**

BY DELEGATES HOWELL, HANSHAW (MR. SPEAKER),  
HAMRICK, KEATON, LINVILLE, BARNHART, HOUSEHOLDER,  
CRISS, CLARK AND HOLSTEIN

[Introduced February 11, 2022; Referred to the Select  
Committee on Tourism and Economic Diversification  
then Finance]

1 A BILL to amend and reenact §11-13A-3c of the Code of West Virginia, 1931, as amended; to  
2 amend said code by adding thereto a new article, designated §11-13MM-1, §11-13MM-2,  
3 §11-13MM-3, §11-13MM-4, §11-13MM-5, §11-13MM-6, §11-13MM-7, §11-13MM-8, §11-  
4 13MM-9, §11-13MM-10, §11-13MM-11, §11-13MM-12, §11-13MM-13, §11-13MM-14,  
5 §11-13MM-15, §11-13MM-16, §11-13MM-17, §11-13MM-18, §11-13MM-19, §11-13MM-  
6 20, and §11-13MM-21; and to amend said code by adding thereto a new section,  
7 designated §22-2-10, all relating to the creation of the Critical Mineral Investment Tax  
8 Credit Act of 2022; exempting rare earth elements, critical minerals, and carbon-based  
9 products otherwise taxed elsewhere in the code; providing for administration and  
10 enforcement of act; providing for a short title; making legislative findings relating to the  
11 mining and processing of rare earth elements and critical minerals, as well as the  
12 manufacturing of products that require rare earth elements and critical minerals;  
13 establishing the legislative purpose for the act; defining terms of the act; specifying an  
14 amount of credit allowable based on amount of qualified investment and the number of  
15 new jobs created as they relate to mining, processing, and manufacturing of products that  
16 require rare earth elements and critical minerals; providing limitations and conditions for  
17 the qualification and use of the act; defining in service or use; providing for the application  
18 of the credit to the corporate net income tax and the personal income tax, as appropriate;  
19 providing for methods of calculation of the qualified investment in rare earth element,  
20 critical mineral, and carbon-based product mining and processing facilities, as well as  
21 manufacturing facilities whose products require rare earth elements, critical minerals, and  
22 carbon-based products; providing for a determination and certification of the number of  
23 new jobs as they relate to the act; providing for carry over and forfeiture of unused tax  
24 credits and redetermination of tax credits under certain circumstances; providing certain  
25 limitations for credits being carried over; providing for full recapture and partial recapture  
26 of credit under certain circumstances and imposing a recapture tax; allowing transfer of

27 qualified investment property without forfeiture or recapture under certain circumstances;  
28 requiring identification of qualified investment property and record keeping; providing  
29 penalties for failure to keep required records; providing for interpretation and construction  
30 of credit; requiring timely filing of application for credit; specifying burden of proof; requiring  
31 periodic tax credit review and accountability reports; authorizing rulemaking; making credit  
32 subject to West Virginia Tax Procedure and Administration Act and West Virginia Tax  
33 Crimes and Penalties Act; providing for severability; allowing for qualified investments;  
34 specifying an effective date for the act; and clarifying ownership of rare earth elements,  
35 critical minerals, and carbon-based products in order to incentivize acid mine drainage  
36 treatment while recovering rare earth elements, critical minerals, and carbon-based  
37 products.

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

## **ARTICLE 13A. SEVERANCE AND BUSINESS PRIVILEGE TAX ACT.**

### **§11-13A-3c. Imposition of tax on privilege of severing other natural resources.**

1 (a) Imposition of tax. -- For the privilege of engaging or continuing within this state in the  
2 business of severing, extracting, reducing to possession and producing for sale, profit or  
3 commercial use any other natural resource product or product not taxed under section three,  
4 three-a, three-b or four of this article, there is hereby levied and shall be collected from every  
5 person exercising this privilege an annual privilege tax.

6 (b) Rate and measure of tax. -- The tax imposed in subsection (a) of this section shall be  
7 four percent of the gross value of the natural resource produced, as shown by the gross proceeds  
8 derived from the sale thereof by producer, except as otherwise provided in this article: *Provided,*  
9 That beginning July 1, 1993, the tax imposed by this section shall be levied and collected at the  
10 rate of four and one-half percent, and beginning July 1, 1994, the tax imposed by this section  
11 shall be levied and collected at the rate of five percent.

12 (c) Tax in addition to other taxes. -- The tax imposed by this section shall apply to all

13 persons severing other natural resources in this state, and shall be in addition to all other taxes  
14 imposed by law.

15 (d) This section shall not apply to those rare earth elements, critical minerals, and carbon-  
16 based products otherwise defined in §11-13MM-3 of this code.

17 ~~(d)~~ (e) Effective date. -- This section, as amended in the year 1993, shall apply to gross  
18 proceeds derived after May 31 of such year. The language of section three of this article, as in  
19 effect on January 1, of such year, shall apply to gross proceeds derived prior to June 1 of such  
20 year and, with respect to such gross proceeds, shall be fully and completely preserved.

## **ARTICLE 13MM. CRITICAL MINERAL INVESTMENT TAX CREDIT ACT OF 2022.**

### **§11-13MM-1. Short title.**

1 This article may be cited as the Critical Mineral Investment Tax Credit Act of 2022.

### **§11-13MM-2. Legislative finding and purpose.**

1 The Legislature finds that investment into the mining and processing of rare earth  
2 elements, carbon-based products, and critical minerals, and the manufacturing of products that  
3 require these rare earth elements, carbon-based products, and critical minerals is in the public's  
4 best interest, and such investment into these three phases promotes the general welfare and  
5 livelihoods of the workers and general population of this state. In order to encourage a greater  
6 capital investment into those businesses and companies who focus on mining, processing, and  
7 manufacturing, there is hereby enacted the Critical Mineral Investment Tax Credit Act. By  
8 enacting this tax credit, it is expected that new and existing companies will take advantage of this  
9 unique opportunity in West Virginia and will create new jobs and facilities for the explicit purpose  
10 of mining and processing of rare earth elements, carbon-based products, critical minerals, and  
11 the manufacturing of products that require these three things.

12 In addition to rare earth elements and critical minerals, energy transition materials also  
13 present a market opportunity for West Virginia, including such carbon-based products as coal-  
14 based pitch fiber, graphite, and more. <https://www.iea.org/reports/the-role-of-critical-minerals-in->

15 clean-energy-transitions/executive-summary. Those who extract and mine rare earth minerals,  
16 critical elements, and carbon-based products will benefit from the act, as well as those who  
17 process the rare earth elements, critical minerals, and carbon-based products after their  
18 extraction. Finally, manufacturing companies whose products require rare earth elements, critical  
19 minerals, and carbon-based products - everything from smart phones to touchscreens in SUVs –  
20 will benefit from the act, and this will position West Virginia to be a leader in this relatively new  
21 field.

**§11-13MM-3. Definitions.**

1 (a) General. – When used in this article, or in the administration of §11-13MM-1 et seq. of  
2 this code, terms defined in subsection (b) have the meanings ascribed to them by this section,  
3 unless a different meaning is clearly required by either the context in which the term is used, or  
4 by specific definition, in §11-13MM-1 et seq. of this code.

5 (b) Terms defined:

6 (1) “Affiliated group” means any affiliated group within the meaning section 1504(a) of the  
7 Internal Revenue Code, or any similar group defined under a similar provision of state, local, or  
8 foreign law, except that section 1504 of the Internal Revenue Code shall be applied by substituting  
9 “more than 50 percent” for “at least 80 percent” each place it appears in that section;

10 (2) “Business” means a business engaged in mining, processing, or manufacturing rare  
11 earth elements or critical minerals which is taxable under §11-21-1 et seq. or §11-24-1 et seq. of  
12 this code;

13 (3) “Business expansion” means capital investment in a new or expanded rare earth  
14 element or critical mineral facility in this state which engages in the mining or processing of rare  
15 earth elements/critical minerals, or manufacturing products from rare earth elements/critical  
16 minerals;

17 (4) “Carbon-based products” or “energy transition materials” are defined as those products  
18 which utilize a carbon base, including, but not limited to, products such as coal-based pitch fiber,  
19 graphite, and otherwise;

20 (5) “Carbon-based product manufacturing” or a “carbon-based product manufacturing  
21 facility” refers to manufacturing operations that occur after both the extraction and processing  
22 phase of carbon, whose companies primarily manufacture products that use carbon, and includes  
23 any factory, mill, plant, warehouse, building, or complex of buildings located within this state,  
24 including the land on which it is located, and all machinery, equipment, and other real and  
25 personal property located at or within the facility, used in connection with the operation of the  
26 facility, in a business that is taxable in this state, and all site preparation and start-up costs of the  
27 taxpayer for the carbon product manufacturing facility which it capitalizes for federal income tax  
28 purposes;

29 (6) “Commissioner” or “Tax Commissioner” are used interchangeably in this article and  
30 mean the Tax Commissioner of the State of West Virginia, or his or her designee;

31 (7) “Compensation” means wages, salaries, commissions, and any other form of  
32 remuneration paid to employees for personal services;

33 (8) “Controlled group of corporations” means a controlled group of corporations as defined  
34 in section 1563(a) of the Internal Revenue Code;

35 (9) “Corporation” means any corporation, joint-stock company, association, or other entity  
36 treated as a corporation for federal income tax purposes, and any business conducted by a trustee  
37 or trustees wherein interest or ownership is evidenced by a certificate of interest or ownership or  
38 similar written instrument;

39 (10) “Critical minerals” mean mineral resources that are essential to the economy and  
40 whose supply may be disrupted. Many of today’s critical minerals are metals that are central to  
41 high-tech sectors. They include, but are not limited to, the rare earth elements (as further defined  
42 in this section) and other metals such as aluminum (bauxite), antimony, arsenic, barite, beryllium,  
43 bismuth, cesium, chromium, cobalt, fluorspar, gallium, germanium, graphite (natural), hafnium,  
44 helium, indium, lithium, magnesium, manganese, niobium, platinum group metals, potash,  
45 rhenium, rubidium, strontium, tantalum, tellurium, tin, titanium, tungsten, uranium, vanadium, and

46 zirconium. This definition is intended to cover those critical minerals defined by the USGS critical  
47 mineral list, as well as the Department of the Interior’s (DOI) designation of critical minerals;

48 (11) “Designee” in the phrase “or his or her designee,” when used in reference to the Tax  
49 Commissioner, means any officer or employee of the State Tax Department duly authorized by  
50 the commissioner directly, or indirectly by one or more redelegations of authority, to perform the  
51 functions mentioned or described in this article;

52 (12) “Eligible taxpayer” means any person who makes qualified investment in a new or  
53 expanded rare earth element or critical mineral mining, processing, or manufacturing facility  
54 located in this state and creates at least the required number of new jobs and who is subject to  
55 any of the taxes imposed by §11-21-1 et seq. or §11-24-1 et seq. of this code;

56 (13) “Expanded facility” means any rare earth element or critical mineral mining or  
57 processing facility, or any manufacturing facility that uses rare earth elements/critical minerals for  
58 their products, other than a new or replacement business facility, resulting from the acquisition,  
59 construction, reconstruction, installation, or erection of improvements or additions to existing  
60 property if the improvements or additions are purchased on or after July 1, 2022, but only to the  
61 extent of the taxpayer’s qualified investment in the improvements or additions;

62 (14) “Includes” and “including” when used in a definition contained in this article, shall not  
63 be considered to exclude other things otherwise within the meaning of the term defined;

64 (15) “Leased property” does not include property which the taxpayer is required to show  
65 on its books and records as an asset under generally accepted principles of financial accounting.  
66 If the taxpayer is prohibited from expensing the lease payments for federal income tax purposes,  
67 the property shall be treated as purchased property under this section;

68 (16) “New rare earth element or critical mineral mining, processing, or product  
69 manufacturing facility” means a business facility which satisfies all the requirements of paragraphs  
70 (A), (B), (C), and (D) of this subdivision.

71 (A) The facility is employed by the taxpayer in the conduct of rare earth element or critical  
72 mineral mining, processing, or product manufacturing activity, the net income of which is or would  
73 be taxable under §11-21-1 et seq. or §11-24-1 et seq. of this code. The facility is not considered  
74 a new rare earth element or critical mineral mining, processing, or product manufacturing facility  
75 in the hands of the taxpayer if the taxpayer's only activity with respect to the facility is to lease it  
76 to another person or persons.

77 (B) The facility is purchased by, or leased to, the taxpayer on or after July 1, 2022.

78 (C) The facility was not purchased or leased by the taxpayer from a related person. The  
79 commissioner may waive this requirement if the facility was acquired from a related party for its  
80 fair market value and the acquisition was not tax motivated.

81 (D) The facility was not in service or use during the 90 days immediately prior to transfer  
82 of the title to the facility, or prior to the commencement of the term of the lease of the facility:  
83 Provided, That this 90-day period may be waived by the commissioner if the commissioner  
84 determines that persons employed at the facility may be treated as "new employees" as that term  
85 is defined in this subsection.

86 (17) "New employee". –

87 (A) The term new employee means an individual hired by the taxpayer to fill a position or  
88 a job in this state which previously did not exist in the taxpayer's rare earth element or critical  
89 mineral mining, processing, or product manufacturing activity in this state prior to the date on  
90 which the taxpayer's qualified investment in a new or expanded rare earth element or critical  
91 mineral mining, processing, or product manufacturing facility is placed in service or use in this  
92 state. In no case may the number of new employees directly attributable to the investment for  
93 purposes of this credit exceed the total net increase in the taxpayer's employment in this state:  
94 Provided, That the Tax Commissioner may require that the net increase in the taxpayer's  
95 employment in this state be determined and certified for the taxpayer's controlled group: Provided,  
96 however, That persons filling jobs saved as a direct result of taxpayer's qualified investment in



97 property purchased or leased for business expansion may be treated as new employees filling  
98 new jobs if the taxpayer certifies the material facts to the commissioner and the Tax Commissioner  
99 expressly finds that:

100 (i) But for the new employer purchasing the assets of a rare earth element or critical  
101 mineral mining, processing, or product manufacturing business in bankruptcy under chapter  
102 seven or 11 of the United States bankruptcy code and the new employer making qualified  
103 investment in property purchased or leased for business expansion, the assets would have been  
104 sold by the United States Bankruptcy Court in a liquidation sale and the jobs saved would have  
105 been lost; or

106 (ii) But for the taxpayer's qualified investment in property purchased or leased for rare  
107 earth element or critical mineral mining, processing, or product manufacturing business expansion  
108 in this state, the taxpayer would have closed its rare earth element or critical mineral mining,  
109 processing, or product manufacturing facility in this state and the employees of the taxpayer  
110 located at the facility would have lost their jobs: *Provided*, That the Tax Commissioner may not  
111 make this certification unless the commissioner finds that the taxpayer is insolvent as defined in  
112 11 U.S.C. §101(32) or that the taxpayer's rare earth element or critical mineral mining, processing,  
113 or product manufacturing facility was destroyed, in whole or in significant part, by fire, flood, or  
114 other act of God.

115 (B) A person is considered to be a new employee only if the person's duties in connection  
116 with the operation of the rare earth element or critical mineral mining, processing, or product  
117 manufacturing facility are on:

118 (i) A regular, full-time and permanent basis:

119 (l) Full-time employment means employment for at least 140 hours per month at a wage  
120 not less than the applicable state or federal minimum wage, depending on which minimum wage  
121 provision is applicable to the business;

122 (II) Permanent employment does not include employment that is temporary or seasonal  
123 and therefore the wages, salaries, and other compensation paid to the temporary or seasonal  
124 employees will not be considered for purposes of §11-13MM-5 of this code;

125 (ii) A regular, part-time, and permanent basis: *Provided*, That the person is customarily  
126 performing the duties at least 20 hours per week for at least six months during the taxable year.

127 (18) “New job” means a job which did not exist in the rare earth element or critical mineral  
128 mining, processing, or product manufacturing business of the taxpayer in this state prior to the  
129 taxpayer’s qualified investment being made, and which is filled by a new employee;

130 (19) “New property” means:

131 (A) Property, the construction, reconstruction, or erection of which is completed on or after  
132 July 1, 2022, and placed in service or use after that date; and

133 (B) Property leased or acquired by the taxpayer that is placed in service or use in this state  
134 on or after July 1, 2022, if the original use of the property commences with the taxpayer and  
135 commences after that date.

136 (20) “Original use” means the first use to which the property is put, whether or not the use  
137 corresponds to the use of the property by the taxpayer;

138 (21) “Partnership” includes a syndicate, group, pool, joint venture, or other unincorporated  
139 organization through or by means of which any business, financial operation, or venture is carried  
140 on, which is treated as a partnership for federal income tax purposes, and which is not a trust or  
141 estate, a corporation, or a sole proprietorship;

142 (22) “Partner” includes a member in such a syndicate, group, pool, joint venture, or other  
143 organization;

144 (23) “Person” includes any natural person, corporation, or partnership;

145 (24) “Property purchased or leased for business expansion”. –

146 (A) *Included property*. – Except as provided in paragraph (B), the term “property  
147 purchased or leased for business expansion” means real property and improvements thereto, and

148 tangible personal property, but only if the real or personal property was constructed, purchased,  
149 or leased and placed in service or use by the taxpayer, for use as a component part of a new or  
150 expanded rare earth element or critical mineral mining, processing, or product manufacturing  
151 facility as defined in this section, which is located within the State of West Virginia. This term  
152 includes only:

153 (i) Real property and improvements thereto having a useful life of four or more years,  
154 placed in service or use on or after July 1, 2022, by the taxpayer;

155 (ii) Real property and improvements thereto, acquired by written lease having a primary  
156 term of 10 or more years and placed in service or use by the taxpayer on or after July 1, 2022;

157 (iii) Tangible personal property placed in service or use by the taxpayer on or after July 1,  
158 2022, with respect to which depreciation, or amortization in lieu of depreciation, is allowable in  
159 determining the personal or corporation net income tax liability of the business taxpayer under  
160 §11-21-1 et seq. or §11-24-1 et seq. of this code, and which has a useful life, at the time the  
161 property is placed in service or use in this state, of four or more years;

162 (iv) Tangible personal property acquired by written lease having a primary term of four  
163 years or longer, that commenced and was executed by the parties thereto on or after July 1, 2020,  
164 if used as a component part of a new or expanded rare earth element or critical mineral mining,  
165 processing, or product manufacturing facility, shall be included within this definition; and

166 (v) Tangible personal property owned or leased, and used by the taxpayer at a business  
167 location outside this state which is moved into the State of West Virginia on or after July 1, 2022,  
168 for use as a component part of a new or expanded rare earth element or critical mineral mining,  
169 processing, or product manufacturing facility located in this state: *Provided*, That if the property is  
170 owned, it must be depreciable or amortizable personal property for income tax purposes, and  
171 have a useful life of four or more years remaining at the time it is placed in service or use in this  
172 state, and if the property is leased, the primary term of the lease remaining at the time the leased  
173 property is placed in service or use in this state, must be four or more years.

174 (B) Excluded property. – The term property purchased or leased for business expansion  
175 does not include:

176 (i) Property owned or leased by the taxpayer and for which the taxpayer was previously  
177 or is currently being allowed tax credit under §11-13D-1 et seq., §11-13Q-1 et seq., §11-13S-1 et  
178 seq., or §11-13U-1 et seq. of this code;

179 (ii) Property owned or leased by the taxpayer and for which the seller, lessor, or other  
180 transferor, was previously or is currently being allowed tax credit under §11-13D-1 et seq., §11-  
181 13Q-1 et seq., §11-13S-1 et seq., or §11-13U-1 et seq. of this code;

182 (iii) Repair costs, including materials used in the repair, unless for federal income tax  
183 purposes the cost of the repair must be capitalized and not expensed;

184 (iv) Airplanes and helicopters;

185 (v) Property which is primarily used outside this state, with use being determined based  
186 upon the amount of time the property is actually used both within and outside this state;

187 (vi) Property which is acquired incident to the purchase of the stock or assets of the seller,  
188 unless for good cause shown, the Tax Commissioner consents to waiving this requirement;

189 (vii) Natural resources in place;

190 (viii) Purchased or leased property, the cost or consideration for which cannot be  
191 quantified with any reasonable degree of accuracy at the time the property is placed in service or  
192 use: *Provided*, That when the contract of purchase or lease specifies a minimum purchase price  
193 or minimum annual rent the amount thereof shall be used to determine the qualified investment  
194 in the property under §11-13LL-6 of this code if the property otherwise qualifies as property  
195 purchased or leased for expansion of a rare earth element or critical mineral mining, processing,  
196 or manufacturing facility.

197 (25) “Purchase” means any acquisition of property, but only if:

198 (A) The property is not acquired from a person whose relationship to the person acquiring  
199 it would result in the disallowance of deductions under section 267 or 707 (b) of the United States  
200 Internal Revenue Code;

201 (B) The property is not acquired by one component member of an affiliated or controlled  
202 group from another component member of the same affiliated or controlled group, as applicable.  
203 The Tax Commissioner may waive this requirement if the property was acquired from a related  
204 party for its then fair market value; and

205 (C) The basis of the property for federal income tax purposes, in the hands of the person  
206 acquiring it, is not determined;

207 (i) In whole or in part, by reference to the federal adjusted basis of the property in the  
208 hands of the person from whom it was acquired; or

209 (ii) Under Section 1014(e) of the United States Internal Revenue Code.

210 (26) "Qualified activity" means any rare earth element or critical mineral mining,  
211 processing, or product manufacturing business activity subject to any of the taxes imposed by  
212 §11-21-1 et seq. or §11-24-1 et seq. of this code;

213 (27) "Rare earth elements" are defined as scandium, yttrium, lanthanum, cerium,  
214 praseodymium, neodymium, promethium, samarium, europium, gadolinium, terbium, dysprosium,  
215 holmium, erbium, thulium, ytterbium, and lutetium. This definition also encompasses critical  
216 minerals as otherwise defined in this section, as well as those critical minerals defined by the  
217 USGS critical mineral list;

218 (28) "Rare earth element or critical element mining" or a "rare earth element or critical  
219 mineral mining facility" refers to rare earth or critical element mining operations that take place  
220 during the initial extraction of rare earth elements or critical elements, and includes any factory,  
221 mill, plant, warehouse, building, or complex of buildings located within this state, including the  
222 land on which it is located, and all machinery, equipment, and other real and personal property  
223 located at or within the facility, used in connection with the operation of the facility, in a business

224 that is taxable in this state, and all site preparation and start-up costs of the taxpayer for the rare  
225 earth element or critical mineral mining facility which it capitalizes for federal income tax purposes;  
226 (29) "Rare earth element or critical element processing" or a "rare earth element or critical  
227 mineral processing facility" refers to rare earth or critical element processing operations that take  
228 place after the initial extraction of rare earth elements or critical elements but before the  
229 manufacturing of such elements/minerals, and includes any factory, mill, plant, warehouse,  
230 building, or complex of buildings located within this state, including the land on which it is located,  
231 and all machinery, equipment, and other real and personal property located at or within the facility,  
232 used in connection with the operation of the facility, in a business that is taxable in this state, and  
233 all site preparation and start-up costs of the taxpayer for the rare earth element or critical mineral  
234 processing facility which it capitalizes for federal income tax purposes;

235 (30) "Rare earth or critical mineral product manufacturing" or a "rare earth element or  
236 critical mineral product manufacturing facility" refers to manufacturing operations that occur after  
237 both the extraction and processing phase of rare earth elements or critical minerals, whose  
238 companies primarily manufacture products that use rare earth elements or critical minerals, and  
239 includes any factory, mill, plant, warehouse, building, or complex of buildings located within this  
240 state, including the land on which it is located, and all machinery, equipment, and other real and  
241 personal property located at or within the facility, used in connection with the operation of the  
242 facility, in a business that is taxable in this state, and all site preparation and start-up costs of the  
243 taxpayer for the rare earth element or critical mineral product manufacturing facility, or any  
244 carbon-based product manufacturing facility, which it capitalizes for federal income tax purposes;

245 (31) "Related person" means:

246 (A) A corporation, partnership, association, or trust controlled by the taxpayer;

247 (B) An individual, corporation, partnership, association, or trust that is in control of the  
248 taxpayer;

249 (C) A corporation, partnership, association, or trust controlled by an individual, corporation,  
250 partnership, association, or trust that is in control of the taxpayer; or

251 (D) A member of the same affiliated or controlled group as the taxpayer.

252 (32) For purposes of this subdivision, control, with respect to a corporation, means  
253 ownership, directly or indirectly, of stock possessing 50 percent or more of the total combined  
254 voting power of all classes of the stock of the corporation entitled to vote.

255 Control, with respect to a trust, means ownership, directly or indirectly, of 50 percent or  
256 more of the beneficial interest in the principal or income of the trust. The ownership of stock in a  
257 corporation, of a capital or profits interest in a partnership or association, or of a beneficial interest  
258 in a trust is determined in accordance with the rules for constructive ownership of stock provided  
259 in section 267(c) of the United States Internal Revenue Code, other than paragraph (3) of that  
260 section.

261 (33) “Replacement rare earth element or critical mineral mining, processing, or product  
262 manufacturing facility” means any property (other than an expanded rare earth element or critical  
263 mineral mining, processing, or product manufacturing facility) that replaces or supersedes any  
264 other property located within this state that:

265 (A) The taxpayer or a related person used in or in connection with any rare earth element  
266 or critical mineral mining, processing, or product manufacturing facility, or any carbon-based  
267 product manufacturing facility, for more than two years during the period of five consecutive years  
268 ending on the date the replacement or superseding property is placed in service by the taxpayer;  
269 or

270 (B) Is not used by the taxpayer or a related person in or in connection with any rare earth  
271 element or critical mineral mining, processing, or product manufacturing facility for a continuous  
272 period of one year or more commencing with the date the replacement or superseding property  
273 is placed in service by the taxpayer.

274 (34) “Taxpayer” means any person subject to any of the taxes imposed by §11-21-1 et  
275 seq. or §11-24-1 et seq. of this code;

276 (35) “This code” means the Code of West Virginia, 1931, as amended;

277 (36) “This state” means the State of West Virginia;

278 (37) “United States Internal Revenue Code” or “I.R.C.” means the Internal Revenue Code  
279 as defined in §11-21-1 et seq. or §11-24-1 et seq. of this code;

280 (38) “Used property” means property acquired after June 30, 2022, that is not “new  
281 property”.

**§11-13MM-4. Amount of credit allowed.**

1 (a) Credit allowed. — Notwithstanding any other provision of this code, eligible taxpayers  
2 are allowed a credit against the portion of taxes imposed by this state that are attributable to and  
3 the consequence of the taxpayer’s qualified investment in a new or expanded rare earth element  
4 or critical mineral mining, processing, or product manufacturing facility in this state, or any carbon-  
5 based product manufacturing facility which results in the creation of new jobs. The amount of this  
6 credit is determined and applied as provided in this article.

7 (b) Amount of credit. — The amount of credit allowable is determined by multiplying the  
8 amount of the taxpayer’s qualified investment, determined under §11-13MM-6 of this code, in  
9 property purchased or leased for a new, or expansion of an existing “rare earth element or critical  
10 mineral mining, processing, or product manufacturing facility”, as defined in §11-13MM-3 of this  
11 code, or a carbon-based product manufacturing facility, as defined in §11-13MM-3 of this code,  
12 by the taxpayer’s new jobs percentage, determined under §11-13MM-7 of this code. The product  
13 of this calculation establishes the maximum amount of credit allowable under this article due to  
14 the qualified investment.

15 (c) Application of credit over 10 years. — The amount of credit allowable must be taken  
16 over a 10-year period, at the rate of one tenth of the amount thereof per taxable year, beginning  
17 with the taxable year in which the taxpayer places the qualified investment in service or use in



18 this state, unless the taxpayer elected to delay the beginning of the 10-year period until the next  
19 succeeding taxable year. This election shall be made in the annual income tax return filed under  
20 this chapter for the taxable year in which qualified investment is first placed into service or use by  
21 the taxpayer. Once made, the election cannot be revoked. The annual credit allowance is taken  
22 in the manner prescribed in §11-13MM-5 of this code.

23 (d) *Placed in service or use.* — For purposes of the credit allowed by this section, property  
24 is considered placed in service or use in the earlier of the following taxable years:

25 (1) The taxable year in which, under the taxpayer's depreciation practice, the period for  
26 depreciation with respect to the property begins; or

27 (2) The taxable year in which the property is placed in a condition or state of readiness  
28 and availability for a specifically assigned function.

**§11-13MM-5. Application of annual credit allowance.**

1 (a) *In general.* — The aggregate annual credit allowance for the current taxable year is an  
2 amount equal to the sum of the following:

3 (1) The one-tenth part allowed under §11-13MM-4 of this code for qualified investment  
4 property placed into service or use during a prior taxable year; plus

5 (2) The one-tenth part allowed under §11-13MM-4 of this code for qualified investment  
6 property placed into service or use during the current taxable year.

7 (b) *Application of current year annual credit allowance.* — The amount determined under  
8 subsection (a) of this section is allowed as a credit against 80 percent of that portion of the  
9 taxpayer's state tax liability which is attributable to and the direct result of the taxpayer's qualified  
10 investment, and applied as provided in subsections (c) and (d), both inclusive, of this section, and  
11 in that order: *Provided*, That if the median salary of the new jobs is higher than the statewide  
12 average nonfarm payroll wage, as determined annually by Workforce West Virginia, the amount  
13 determined under subsection (a) of this section is allowed as a credit against 100 percent of that  
14 portion of the taxpayer's state tax liability which is attributable to and the direct result of the

15 taxpayer's qualified investment, and shall be applied, as provided in subsections (c) through (d),  
16 both inclusive, of this section, and in that order.

17 (c) Corporation net income taxes. —

18 (1) That portion of the allowable credit attributable to qualified investment in rare earth  
19 element or critical mineral mining, processing, or product manufacturing facility, or a carbon-  
20 based product manufacturing facility, may be applied to reduce the taxes imposed by §11-24-1 et  
21 seq. of this code for the taxable year as determined before application of allowable credits against  
22 tax.

23 (2) If the taxes due under §11-24-1 et seq. of this code, as determined before application  
24 of allowable credits against tax, are not solely attributable to and the direct result of the taxpayer's  
25 qualified investment in a rare earth element or critical mineral mining, processing, product  
26 manufacturing business, or the taxpayer's qualified investment into a carbon-based product  
27 manufacturing business, the amount of the taxes that is attributable are determined by multiplying  
28 the amount of taxes due under §11-24-1 et seq. of this code for the taxable year, as determined  
29 before application of allowable credits against tax, by a fraction, the numerator of which is all  
30 wages, salaries, and other compensation paid during the taxable year to all employees of the  
31 taxpayer employed in this state whose positions are directly attributable to the qualified  
32 investment. The denominator of the fraction is the wages, salaries, and other compensation paid  
33 during the taxable year to all employees of the taxpayer employed in this state.

34 (d) Personal income taxes. —

35 (1) If the person making the qualified investment in a rare earth element or critical mineral  
36 mining, processing, or manufacturing facility, or a carbon-based product manufacturing facility, is  
37 an electing small business corporation, as defined in section 1361 of the United States Internal  
38 Revenue Code, a partnership, a limited liability company that is treated as a partnership for federal  
39 income tax purposes, or a sole proprietorship, then any unused credit is allowed as a credit  
40 against the taxes imposed by §11-21-1 et seq. of this code on the income from a rare earth

41 element, critical mineral, or carbon-based product mining, processing, or product manufacturing  
42 facility, or on income of a sole proprietor attributable to the rare earth element, critical mineral, or  
43 carbon-based product mining, processing, or product manufacturing facility.

44 (2) Electing small business corporations, limited liability companies treated as  
45 partnerships for federal income tax purposes, partnerships, and other unincorporated  
46 organizations shall allocate the credit allowed by this article among its members in the same  
47 manner as profits and losses are allocated for the taxable year.

48 (3) If the amount of taxes due under §11-21-1 et seq. of this code, as determined before  
49 application of allowable credits against tax, that is attributable to business, is not solely attributable  
50 to and the direct result of the qualified investment of the electing small business corporation,  
51 limited liability company treated as a partnership for federal income tax purposes, other  
52 unincorporated organization, or sole proprietorship, the amount of the taxes that are so  
53 attributable are determined by multiplying the amount of taxes due under §11-21-1 et seq. of this  
54 code, as determined before application of allowable credits against tax that is attributable to  
55 business by a fraction, the numerator of which is all wages, salaries, and other compensation paid  
56 during the taxable year to all employees of the electing small business corporation, limited liability  
57 company, partnership, other unincorporated organization, or sole proprietorship employed in this  
58 state, whose positions are directly attributable to the qualified investment. The denominator of the  
59 fraction is the wages, salaries, and other compensation paid during the taxable year to all  
60 employees of the taxpayer.

61 (4) No credit is allowed under this section against any employer withholding taxes imposed  
62 by §11-21-1 et seq. of this code.

63 (e) If the wages, salaries, and other compensation fraction formula provisions of  
64 subsections (c) and (d) of this section, inclusive, do not fairly represent the taxes solely attributable  
65 to and the direct result of qualified investment of the taxpayer the Tax Commissioner may require,  
66 in respect to all or any part of the taxpayer's businesses or activities, if reasonable:

67 (1) Separate accounting or identification;

68 (2) Adjustment to the wages, salaries, and other compensation fraction formula to reflect  
 69 all components of the tax liability;

70 (3) The inclusion of one or more additional factors that will fairly represent the taxes solely  
 71 attributable to and the direct result of the qualified investment of the taxpayer and all other project  
 72 participants in the businesses or other activities subject to tax; or

73 (4) The employment of any other method to effectuate an equitable attribution of the taxes.  
 74 In order to effectuate the purposes of this subsection, the Tax Commissioner may propose for  
 75 promulgation rules, including emergency rules, in accordance with §29A-3-1 et seq. of this code.

76 (f) Unused credit. — If any credit remains after application of subsection (b) of this section,  
 77 the amount thereof is carried forward to each ensuing tax year until used or until the expiration of  
 78 the 10th taxable year subsequent to the end of the initial 10-year credit application period. If any  
 79 unused credit remains after the 20th year, the amount thereof is forfeited. No carryback to a prior  
 80 taxable year is allowed for the amount of any unused portion of any annual credit allowance.

**§11-13MM-6. Qualified investment.**

1 (a) General. — The qualified investment in property purchased or leased for a new, or  
 2 expansion of an existing, rare earth element or critical mineral mining, processing, or product  
 3 manufacturing facility, or a carbon-based product manufacturing facility, is the applicable  
 4 percentage of the cost of each property purchased or leased for the purpose of the new, or  
 5 expansion of an existing, rare earth element or critical mineral mining, processing, or product  
 6 manufacturing facility, or a carbon-based product manufacturing facility, which is placed in service  
 7 or use in this state by the taxpayer during the taxable year.

8 (b) Applicable percentage. — For the purpose of subsection (a), the applicable percentage  
 9 of any property is determined under the following table:

If useful life is:	The applicable percentage is:
Less than four years	0%

12	<u>Four years or more but less than six years</u>	<u>33 1/3%</u>
13	<u>Six years or more but less than eight years</u>	<u>66 2/3%</u>
14	<u>Eight years or more</u>	<u>100%</u>

15 The useful life of any property, for purposes of this section, is determined as of the date  
 16 the property is first placed in service or use in this state by the taxpayer, determined in accordance  
 17 with such rules and requirements the Tax Commissioner may prescribe.

18 (c) Cost. — For purposes of subsection (a) of this section, the cost of each property  
 19 purchased for a new, or expansion of an existing, rare-earth element or critical mineral mining,  
 20 processing, or manufacturing facility is determined under the following rules:

21 (1) Trade-ins. — Cost does not include the value of property given in trade or exchange  
 22 for the property purchased for a new, or for expansion of an existing, rare-earth element or critical  
 23 mineral mining, processing, or manufacturing facility, or a carbon-based product manufacturing  
 24 facility; or

25 (2) Damaged, destroyed, or stolen property. — If property is damaged or destroyed by  
 26 fire, flood, storm, or other casualty, or is stolen, then the cost of replacement property does not  
 27 include any insurance proceeds received in compensation for the loss.

28 (3) Rental property. —

29 (A) The cost of real property acquired by written lease for a primary term of 10 years or  
 30 longer is 100 percent of the rent reserved for the primary term of the lease, not to exceed 20  
 31 years.

32 (B) The cost of tangible personal property acquired by written lease for a primary term of:

33 (i) Four years, or longer, is one third of the rent reserved for the primary term of the lease;

34 (ii) Six years, or longer, is two thirds of the rent reserved for the primary term of the lease;

35 or

36 (iii) Eight years, or longer, is 100 percent of the rent reserved for the primary term of the  
 37 lease, not to exceed 20 years: *Provided*, That in no event may rent reserved include rent for any

38 year subsequent to expiration of the book life of the equipment, determined using the straight-line  
39 method of depreciation.

40 (4) Self-constructed property. — In the case of self-constructed property, the cost thereof  
41 is the amount properly charged to the capital account for depreciation in accordance with federal  
42 income tax law.

43 (5) Transferred property. — The cost of property used by the taxpayer out-of-state and  
44 then brought into this state, is determined based on the remaining useful life of the property at the  
45 time it is placed in service or use in this state, and the cost is the original cost of the property to  
46 the taxpayer less straight line depreciation allowable for the tax years or portions thereof the  
47 taxpayer used the property outside this state. In the case of leased tangible personal property,  
48 cost is based on the period remaining in the primary term of the lease after the property is brought  
49 into this state for use in a new or expanded business facility of the taxpayer, and is the rent  
50 reserved for the remaining period of the primary term of the lease, not to exceed 20 years, or the  
51 remaining useful life of the property, as determined as aforesaid, whichever is less.

**§11-13MM-7. New jobs percentage.**

1 (a) In general. — The new jobs percentage is based on the number of new jobs created  
2 in this state directly attributable to the qualified investment of the taxpayer.

3 (b) When a job is attributable. — An employee's position is directly attributable to the  
4 qualified investment if:

5 (1) The employee's service is performed or his or her base of operations is at the new or  
6 expanded rare earth element or critical mineral mining, processing, or manufacturing facility, or a  
7 carbon-based product manufacturing facility;

8 (2) The position did not exist prior to the construction, renovation, expansion, or acquisition  
9 of the rare earth element or critical mineral mining, processing, or product manufacturing facility,  
10 or carbon-based product manufacturing facility, and the making of the qualified investment; and

11 (3) But for the qualified investment, the position would not have existed.

12 (c) Applicable percentage. — For the purpose of subsection (a) of this section, the  
 13 applicable new jobs percentage is determined under the following table:

14	<u>If number of new jobs is at least:</u>	<u>The applicable percentage is:</u>
15	<u>5</u>	<u>10%</u>
16	<u>50</u>	<u>15%</u>
17	<u>150</u>	<u>20%</u>

18 (d) Certification of new jobs. — With the annual return for the applicable taxes filed for the  
 19 taxable year in which the qualified investment is first placed in service or use in this state, the  
 20 taxpayer shall estimate and certify the number of new jobs reasonably projected to be created by  
 21 it in this state within the period prescribed in subsection (f) of this section that are, or will be,  
 22 directly attributable to the qualified investment of the taxpayer. For purposes of this section,  
 23 applicable taxes means the taxes imposed by §11-21-1 et seq. or §11-24-1 et seq. of this code  
 24 against which this credit is applied.

25 (e) Equivalency of permanent employees. — The hours of part-time employees shall be  
 26 aggregated to determine the number of equivalent full-time employees for the purpose of this  
 27 section.

28 (f) Redetermination of new jobs percentage. — With the annual return for the applicable  
 29 taxes imposed, filed for the third taxable year in which the qualified investment is in service or  
 30 use, the taxpayer shall certify the actual number of new jobs created by it in this state that are  
 31 directly attributable to the qualified investment of the taxpayer.

32 (1) If the actual number of jobs created would result in a higher new jobs percentage, the  
 33 credit allowed under this article shall be redetermined and amended returns shall be filed for the  
 34 first and second taxable years that the qualified investment was in service or use in this state.

35 (2) If the actual number of jobs created would result in a lower new jobs percentage, the  
 36 credit previously allowed under this article shall be redetermined and amended returns shall be  
 37 filed for the first and second taxable years. In applying the amount of redetermined credit

38 allowable for the two preceding taxable years, the redetermined credit shall first be applied to the  
39 extent it was originally applied in the prior two years to personal income taxes, and then to  
40 corporation net income taxes. Any additional taxes due under this chapter shall be remitted with  
41 the amended returns filed with the Tax Commissioner, along with interest, as provided in §11-10-  
42 17 of this code, and a 10 percent penalty determined on the amount of taxes due with the  
43 amended return, which may be waived by the commissioner if the taxpayer shows that the  
44 overclaimed amount of the new jobs percentage was due to reasonable cause and not due to  
45 willful neglect.

46 (g) *Additional new jobs percentage.* — When the qualified investment is \$20 million or  
47 more and if the number of full-time construction laborers and mechanics working at the job site of  
48 the new or expanded business facility is 50 or more, or if the number of hours of all construction  
49 laborers and mechanics working at the job site is equal to or greater than the number of hours 50  
50 full-time construction laborers and mechanics would have worked at the job site during a 12  
51 consecutive month period, a taxpayer that is allowed a new jobs percentage determined under  
52 subsection (a) of this section shall be allowed a new jobs percentage that is five percentage points  
53 higher than the new jobs percentage allowed under subsection (a) of this section. In no event  
54 may construction laborers and mechanics be used to attain or retain a subsection (a) new jobs  
55 percentage. The number of full-time construction laborers and mechanics working at the job site  
56 shall be determined by dividing the total number of hours worked by all construction laborers and  
57 mechanics on a new or expanded business facility during a 12 consecutive month period by 2,080  
58 hours per year. A taxpayer may not claim the additional new jobs percentage allowed by this  
59 section unless the taxpayer includes with the certification filed under subsection (d) of this section  
60 a certification signed by the general contractor or the construction manager certifying that  
61 construction laborers employed at the job site during a consecutive 12 month period aggregated  
62 the equivalent of at least 50 full-time employees and the taxpayer has received from the general  
63 contractor or construction manager records substantiating the certification, which records shall be



64 retained by the taxpayer for 13 years after the day the expansion to an existing business facility,  
65 or the new business facility, is first placed in service or use by the taxpayer. For purposes of  
66 subsection (g) of this section:

67 (1) The term construction laborers and mechanics means those workers, utilized by a  
68 contractor or subcontractor at any tier, whose duties are manual or physical in nature, including  
69 those workers who use tools or are performing the work of a trade, as distinguished from mental  
70 or managerial and working supervisors who devote more than 20 percent of their time during a  
71 workweek performing the duties of a laborer or mechanic; and

72 (2) The term job site is limited to the physical place or places where the construction called  
73 for in the contract will remain when the work on it is completed and nearby property, as described  
74 in subdivision (3) of this subsection, used by the contractor or subcontractor during construction  
75 that, because of proximity, can reasonably be included in the site.

76 (3) Except as provided in subdivision (4) of this subsection, fabrication plants, mobile  
77 factories, batch plants, borrow pits, job headquarters, and tool yards are part of the job site  
78 provided they are dedicated exclusively, or nearly so, to performance of the contract or project  
79 and are located in proximity to the actual construction location so that it would be reasonable to  
80 include them.

81 (4) The term "job site" does not include permanent home offices, branch offices, branch  
82 plant establishments, fabrication yards, or tool yards of a contractor or subcontractor whose  
83 locations and continuance in operation are determined without regard to the contract or  
84 subcontract for construction of a new or expanded business facility.

**§11-13MM-8. Forfeiture of unused tax credits; redetermination of credit allowed.**

1 (a) *Disposition of property or cessation of use.* — If during any taxable year, property with  
2 respect to which a tax credit has been allowed under §11-13MM-1 *et seq.* of this code:

3 (1) Is disposed of prior to the end of its useful life, as determined under §11-13MM-6 of  
4 this code; or

5 (2) Ceases to be used in a rare earth element or critical mineral mining, processing, or  
6 product manufacturing facility, or a carbon-based product manufacturing facility, of the taxpayer  
7 in this state prior to the end of its useful life, as determined under §11-13MM-6 of this code, then  
8 the unused portion of the credit allowed for the property is forfeited for the taxable year and all  
9 ensuing years. Additionally, except when the property is damaged or destroyed by fire, flood,  
10 storm, or other casualty, or is stolen, the taxpayer shall redetermine the amount of credit allowed  
11 in all earlier years by reducing the applicable percentage of cost of the property allowed under  
12 §11-13MM-5 of this code, to correspond with the percentage of cost allowable for the period of  
13 time that the property was actually used in this state in the new or expanded business of the  
14 taxpayer. The taxpayer shall then file a reconciliation statement for the year in which the forfeiture  
15 occurs and pay any additional taxes owed due to reduction of the amount of credit allowable for  
16 the earlier years, plus interest and any applicable penalties. The reconciliation statement shall be  
17 filed with the annual income return for the primary tax for which the taxpayer is liable under §11-  
18 21-1 et seq. or §11-24-1 et seq. of this code, whichever is applicable.

19 (b) Cessation of operation of rare earth element or critical mineral mining, processing, or  
20 product manufacturing facility. — If during any taxable year the taxpayer ceases operation of a  
21 rare earth element or critical mineral mining, processing, or product manufacturing facility, or a  
22 carbon-based product manufacturing facility, in this state for which credit was allowed under this  
23 article, before expiration of the useful life of property with respect to which tax credit has been  
24 allowed under this article, then the unused portion of the allowed credit is forfeited for the taxable  
25 year and for all ensuing years. Additionally, except when the cessation is due to fire, flood, storm,  
26 or other casualty, the taxpayer shall redetermine the amount of credit allowed in earlier years by  
27 reducing the applicable percentage of cost of the property allowed under §11-13MM-6 of this  
28 code, to correspond with the percentage of cost allowable for the period of time that the property  
29 was actually used in this state in a rare earth element or critical mineral mining, processing, or  
30 product manufacturing business, or a carbon-based product manufacturing business, of the

31 taxpayer that is taxable under §11-24-1 et seq. of this code, or in the case of a partnership, limited  
32 liability company treated as a partnership for federal income tax purposes, electing small business  
33 corporation, other unincorporated entity, or sole proprietorship, taxable under §11-21-1 et seq. of  
34 this code. The taxpayer shall then file a reconciliation statement with the annual return for the  
35 primary tax for which the taxpayer is liable under §11-21-1 et seq. or §11-24-1 et seq. of this code,  
36 whichever is applicable, for the year in which the forfeiture occurs, and pay any additional taxes  
37 owed due to the reduction of the amount of credit allowable for the earlier years, plus interest and  
38 any applicable penalties.

39 (c) Reduction in number of employees. — If during any taxable year subsequent to the  
40 taxable year in which the new jobs percentage is redetermined as provided in §11-13MM-7 of this  
41 code, the average number of employees of the taxpayer, for the then current taxable year,  
42 employed in positions created because of and directly attributable to the qualified investment falls  
43 below the minimum number of new jobs created upon which the taxpayer's annual credit  
44 allowance is based, the taxpayer shall calculate what his or her annual credit allowance would  
45 have been had his or her new jobs percentage been determined based upon the average number  
46 of employees, for the then current taxable year, employed in positions created because of and  
47 directly attributable to the qualified investment. The difference between the result of this  
48 calculation and the taxpayer's annual credit allowance for the qualified investment as determined  
49 under §11-13MM-4 of this code, is forfeited for the then current taxable year, and for each  
50 succeeding taxable year unless for a succeeding taxable year the taxpayer's average  
51 employment in positions directly attributable to the qualified investment once again meets the  
52 level required to enable the taxpayer to utilize its full annual credit allowance for that taxable year.

**§11-13MM-9. Recapture of credit; recapture tax imposed.**

1 (a) When recapture tax applies. —

2 (1) Any person who places qualified investment property in service or use at a rare earth  
3 element or critical mineral mining, processing, or manufacturing facility, or a carbon-based

4 product manufacturing facility, and who fails to use the qualified investment property for at least  
5 the period of its useful life, as determined as of the time the property was placed in service or use,  
6 or the period of time over which tax credits allowed under this article with respect to the property  
7 are applied under this article, whichever period is less, and who reduces the number of its  
8 employees filling new jobs at its rare earth element or critical mineral mining, processing, or  
9 product manufacturing facility, or a carbon-based product manufacturing facility, in this state,  
10 which were created and are directly attributable to the qualified investment property, after the third  
11 taxable year in which the qualified investment property was placed in service or use, or fails to  
12 continue to employ individuals in all the new jobs created as a direct result of the qualified  
13 investment property and used to qualify for the credit allowed by this article, prior to the end of  
14 the 10th taxable year after the qualified investment property was placed in service or use, the  
15 person shall pay the recapture tax imposed by subsection (b) of this section.

16 (2) This section does not apply when §11-13MM-11 of this code applies. However, the  
17 successor, or the successors, and the person, or persons, who previously claimed credit under  
18 this article with respect to the qualified investment property and the new jobs attributable thereto,  
19 are jointly and severally liable for payment of any recapture tax subsequently imposed under this  
20 section with respect to the qualified investment property and new jobs.

21 (b) Recapture tax imposed. — The recapture tax imposed by this subsection is the amount  
22 determined as follows:

23 (1) Full recapture. — If the taxpayer prematurely removes qualified investment property  
24 placed in service (when considered as a class) from economic service in the taxpayer's rare earth  
25 element or critical mineral mining, processing, or product manufacturing facility in this state, or a  
26 carbon-based product manufacturing facility in this state, and the number of employees filling the  
27 new jobs created by the person falls below the number of new jobs required to be created in order  
28 to qualify for the amount of credit being claimed, the taxpayer shall recapture the amount of credit  
29 claimed under §11-13MM-5 of this code for the taxable year, and all preceding taxable years, on

30 qualified investment property which has been prematurely removed from service. The amount of  
31 tax due under this subdivision is an amount equal to the amount of credit that is recaptured under  
32 this subdivision.

33 (2) *Partial recapture.* — If the taxpayer prematurely removes qualified investment property  
34 from economic service in the taxpayer's rare earth element or critical mineral mining, processing,  
35 or product manufacturing facility in this state, and the number of employees filling the new jobs  
36 created by the person remains 20 or more, but falls below the number necessary to sustain  
37 continued application of credit determined by use of the new job percentage upon which the  
38 taxpayer's one-tenth annual credit allowance was determined under §11-13MM-4 of this code,  
39 taxpayer shall recapture an amount of credit equal to the difference between:

40 (A) The amount of credit claimed under §11-13MM-5 of this code for the taxable year, and  
41 all preceding taxable years; and

42 (B) The amount of credit that would have been claimed in those years if the amount of  
43 credit allowable under §11-13MM-4 of this code had been determined based on the qualified  
44 investment property which remains in service using the average number of new jobs filled by  
45 employees in the taxable year for which recapture occurs. The amount of tax due under this  
46 subdivision is an amount equal to the amount of credit that is recaptured under this subdivision.

47 (3) *Additional recapture.* — If after a partial recapture under subdivision (2) of this  
48 subsection, the taxpayer further reduces the number of employees filling new jobs, the taxpayer  
49 shall recapture an additional amount determined as provided under subdivision (1) of this  
50 subsection. The amount of tax due under this subdivision is an amount equal to the amount of  
51 credit that is recaptured under this subdivision.

52 (c) *Payment of recapture tax.* — The amount of tax recaptured under this section is due  
53 and payable on the day the person's annual return is due for the taxable year in which this section  
54 applies, under §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code. When the employer is a

55 partnership, limited liability company, or S corporation for federal income tax purposes, the  
56 recapture tax shall be paid by those persons who are partners in the partnership, members in the  
57 company, or shareholders in the S corporation, in the taxable year in which recapture occurs  
58 under this section.

59 (d) Rules. — The Tax Commissioner may promulgate such rules as may be useful or  
60 necessary to carry out the purpose of this section and to implement the intent of the Legislature.  
61 Rules shall be promulgated in accordance with the provisions of §29A-3-1 et seq. of this code.

**§11-13MM-10. Transfer of qualified investment to successors.**

1 (a) Mere change in form of business. — Property may not be treated as disposed of under  
2 §11-13MM-8 of this code, by reason of a mere change in the form of conducting the business as  
3 long as the property is retained in the successor's rare earth element or critical mineral mining,  
4 processing, or product manufacturing facility in this state, or a carbon-based product  
5 manufacturing facility in this state, and the transferor business retains a controlling interest in the  
6 successor business. In this event, the successor business is allowed to claim the amount of credit  
7 still available with respect to the business facility or facilities transferred, and the transferor  
8 business may not be required to redetermine the amount of credit allowed in earlier years.

9 (b) Transfer or sale to successor. — Property is not treated as disposed of under §11-  
10 13MM-10 of this code by reason of any transfer or sale to a successor business which continues  
11 to operate the rare earth element or critical mineral mining, processing, or product manufacturing  
12 facility in this state, or a carbon-based product manufacturing facility in this state. Upon transfer  
13 or sale, the successor shall acquire the amount of credit that remains available under this article  
14 for each subsequent taxable year and the transferor business is not required to redetermine the  
15 amount of credit allowed in earlier years.

**§11-13MM-11. Identification of investment credit property.**

1 Every taxpayer who claims credit under §11-13MM-1 et seq. of this code shall maintain  
2 sufficient records to establish the following facts for each item of qualified property:

- 3           (1) Its identity;  
4           (2) Its actual or reasonably determined cost;  
5           (3) Its straight-line depreciation life;  
6           (4) The month and taxable year in which it was placed in service;  
7           (5) The amount of credit taken; and  
8           (6) The date it was disposed of or otherwise ceased to be use as qualified property in the  
9 rare earth element or critical mineral mining, processing, or product manufacturing facility of the  
10 taxpayer.

**§11-13MM-12. Failure to keep records of investment credit property.**

1           A taxpayer who does not keep the records required for identification of investment credit  
2 property is subject to the following rules:

3           (1) A taxpayer is treated as having disposed of, during the taxable year, any investment  
4 credit property which the taxpayer cannot establish was still on hand, in this state, at the end of  
5 that year.

6           (2) If a taxpayer cannot establish when investment credit property reported for purposes  
7 of claiming this credit returned during the taxable year was placed in service, the taxpayer is  
8 treated as having placed it in service in the most recent prior year in which similar property was  
9 placed in service, unless the taxpayer can establish that the property placed in service in the most  
10 recent year is still on hand. In that event, the taxpayer will be treated as having placed the returned  
11 property in service in the next most recent year.

**§11-13MM-13. Interpretation and construction.**

1           (a) No inference, implication, or presumption of legislative construction or intent may be  
2 drawn or made by reason of the location or grouping of any particular section, provision, or portion  
3 of §11-13MM-1 et seq. of this code; and no legal effect may be given to any descriptive matter or  
4 heading relating to any section, subsection, or paragraph of this article.

5           (b) The provisions of §11-13MM-1 et seq. of this code shall be reasonably construed in  
6 order to effectuate the legislative intent recited in §11-13MM-2 of this code.

**§11-13MM-14. Burden of proof; application required; failure to make timely application.**

1           (a) Burden of proof. — The burden of proof is on the taxpayer to establish by clear and  
2 convincing evidence that the taxpayer is entitled to the benefits allowed by §11-13MM-1 et seq.  
3 of this code.

4           (b) Application for credit required. —

5           (1) Application required. — Notwithstanding any provision of this article to the contrary, no  
6 credit is allowed or may be applied under §11-13MM-1 et seq. of this code for any qualified  
7 investment property placed in service or use until the person asserting a claim for the allowance  
8 of credit under this article makes written application to the commissioner for allowance of credit  
9 as provided in this subsection. An application for credit shall be filed, in the form prescribed by  
10 the Tax Commissioner, no later than the last day for filing the tax returns, determined by including  
11 any authorized extension of time for filing the return, required under §11-21-1 et seq. or §11-24-  
12 1 et seq. of this code for the taxable year in which the property to which the credit relates is placed  
13 in service or use and all information required by the form shall be provided.

14           (2) Failure to make timely application. — The failure to timely apply for the credit results  
15 in the forfeiture of 50 percent of the annual credit allowance otherwise allowable under §11-  
16 13MM-1 et seq. of this code. This penalty applies annually until the application is filed.

**§11-13MM-15. Tax credit review and accountability.**

1           (a) Beginning on February 1, 2027, and every third year thereafter, the Tax Commissioner  
2 shall submit to the Governor, the President of the Senate, and the Speaker of the House of  
3 Delegates a tax credit review and accountability report evaluating the cost effectiveness of this  
4 credit during the most recent three-year period for which information is available. The criteria to  
5 be evaluated shall include, but not be limited to, for each year of the three-year period:

6           (1) The numbers of taxpayers claiming the credit;



7 (2) The net number of new jobs created by all taxpayers claiming the credit;

8 (3) The cost of the credit;

9 (4) The cost of the credit per new job created; and

10 (5) Comparison of employment trends for an industry and for taxpayers within the industry  
11 that claim the credit.

12 (b) Taxpayers claiming the credit shall provide any information the Tax Commissioner may  
13 require to prepare the report required by this section: *Provided*, That the information provided is  
14 subject to the confidentiality and disclosure provisions of §11-10-5d of this code.

15 (c) On or before February 1, 2027, the Department of Commerce, in consultation with the  
16 Tax Commissioner, the Department of Transportation, and the Department of Environmental  
17 Protection shall submit to the Governor, the President of the Senate, and the Speaker of the  
18 House of Delegates a report of the impact of all the tax credits and other economic incentives  
19 provided in §11-13MM-1 *et seq.* of this code upon: (1) Economic development in this state,  
20 including, but not limited to, the creation of jobs in this state; (2) the state's infrastructure,  
21 including, but not limited to, the need for construction or maintenance of the roads and highways  
22 of the state; (3) the natural resources of the state; and (4) upon public and private property  
23 interests in the state.

**§11-13MM-16. Rules.**

1 The Tax Commissioner may promulgate such interpretive, legislative, and procedural  
2 rules as the commissioner deems to be useful or necessary to carry out the purpose of §11-  
3 13MM-1 *et seq.* of this code and to implement the intent of the Legislature. The Tax Commissioner  
4 may promulgate emergency rules if they are filed in the West Virginia Register before January 1,  
5 2022. All rules shall be promulgated in accordance with the provisions of §29A-3-1 *et seq.* of this  
6 code.

**§11-13MM-17. General procedure and administration.**

1           Each and every provision of the “West Virginia Tax Procedure and Administration Act” set  
2 forth in §11-10-1 et seq. of this code applies to the tax credit allowed under §11-13MM-1 et seq.  
3 of this code, except as otherwise expressly provided in this article, with like effect as if that act  
4 were applicable only to the tax credit allowed by §11-13MM-1 et seq. of this code and were set  
5 forth in extenso in this article.

**§11-13MM-18. Crimes and penalties.**

1           Each and every provision of the “West Virginia Tax Crimes and Penalties Act” set forth in  
2 §11-9-1 et seq. of this code applies to the tax credit allowed by §11-13MM-1 et seq. of this code  
3 with like effect as if that act were applicable only to the tax credit §11-13MM-1 et seq. of this code  
4 and were set forth in extenso in this article.

**§11-13MM-19. Severability.**

1           (a) If any provision of §11-13MM-1 et seq. of this code, or the application thereof, is for  
2 any reason adjudged by any court of competent jurisdiction to be invalid, the judgment may not  
3 affect, impair, or invalidate the remainder of §11-13MM-1 et seq. of this code, but shall be confined  
4 in its operation to the provision thereof directly involved in the controversy in which the judgment  
5 shall have been rendered, and the applicability of the provision to other persons or circumstances  
6 may not be affected thereby.

7           (b) If any provision of §11-13MM-1 et seq. of this code, or the application thereof, is made  
8 invalid or inapplicable by reason of the repeal or any other invalidation of any statute therein  
9 addressed or referred to, such invalidation or inapplicability may not affect, impair, or invalidate  
10 the remainder of §11-13MM-1 et seq. of this code, but shall be confined in its operation to the  
11 provision thereof directly involved with, pertaining to, addressing, or referring to the statute, and  
12 the application of the provision with regard to other statutes or in other instances not affected by  
13 any such repealed or invalid statute may not be abrogated or diminished in any way.

**§11-13MM-20. Applicability to qualified investment property.**

1           Nothing in this article prohibits a qualified investment property from being subject to a

2 payment in lieu of taxes agreement as provided for in §7-11B-18 of this code.

**§11-13MM-21. Effective date.**

1 The credit allowed by this article is allowable for qualified investment property placed in  
2 service or use on or after July 1, 2023, subject to the rules contained in §11-13MM-1 et seq. of  
3 this code and rules promulgated by the Tax Commissioner pursuant to §29A-3-1 et seq. of this  
4 code.

## **CHAPTER 22. ENVIRONMENTAL RESOURCES.**

### **ARTICLE 2. ABANDONED MINE LANDS AND RECLAMATION ACT.**

**§22-2-10. Ownership of substances derived from treatment of acid mine drainage.**

1 (a) Treatment of acid mine drainage reduces its environmental harm by reducing metal  
2 and acid pollution of receiving streams. Treatment also produces materials that may contain  
3 valuable concentrations of rare earth elements and critical materials. Various parties may elect or  
4 be compelled to treat acid mine drainage. In order to encourage the treatment of acid mine  
5 drainage, the State of West Virginia determines that all chemical compounds, elements, and other  
6 materials of value derived from the byproducts of acid mine drainage treatment may, at the  
7 discretion of the treating party accrue, be used by the treating party or its designee for its  
8 commercial benefit. This condition applies regardless of land or other mineral ownership claims.

9 (b) The DEP may promulgate such emergency, interpretive, legislative, and procedural  
10 rules as the secretary deems to be useful or necessary to carry out the purpose of this article and  
11 to implement the intent of the Legislature.

NOTE: The purpose of this bill is to create the Critical Mineral Investment Tax Credit Act of 2022. The bill exempts rare earth elements, critical minerals, and carbon-based products otherwise taxed elsewhere in code. The amount of credit allowable depends upon the cost of the qualified investment property and the number of new jobs created. Property that qualifies for another tax credit in chapter 11 of the West Virginia Code is not eligible for credit under this bill. Similarly, qualified investment property under this bill is not eligible for another credit under chapter 11 of the code. The bill includes rules for administration and enforcement of the credit. If enacted, the credit would apply to qualified investment property placed in service or use at a rare earth element or critical mineral mining or processing

facility, or a manufacturing facility that uses rare earth elements or critical minerals in this state. The bill allows for qualified investment. The bill provides for an effective date. Finally, the bill establishes clear legal right to the title of chemical compounds, elements, and substances that are derived from the treatment of acid mine drainage on mined lands.

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