

Appendix J: West Virginia Senate Bill 145

Approved by
6054200
4/8/98

ENROLLED

COMMITTEE SUBSTITUTE
FOR

Senate Bill No. 145

(SENATORS ANDERSON, DITTMAR, ROSS, SHARPE,
WHITE, BOWMAN, WALKER, HELMICK, SCHOONOVER,
MCKENZIE AND DUGAN, *original sponsors*)

[Passed March 14, 1998; in effect ninety days from passage.]

AN ACT to amend and reenact section six, article one, chapter twenty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend article eleven of said chapter by adding thereto a new section, designated section seven-a, all relating generally to establishing a water quality certification program for surface mining operations; authorizing the director to enter into certification agreements; providing for certifying upon receipt of certain federal permits; requiring compliance with current environmental laws; providing circumstances when a certification is required; establishing mitigation ratios and

fees for loss of waters of this state; requiring certain activities as part of certification requirements; establishing requirements and review of mitigation by the director; establishing application processing requirements for the director; providing for public participation of application approval process; providing that the legislative auditor conduct a performance review of the mitigation program; requiring the director to conduct a study and enter into certain agreements; and authorizing the joint committee on government and finance to conduct a study and establishing guidelines for the study.

Be it enacted by the Legislature of West Virginia:

That section six, article one, chapter twenty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that article eleven of said chapter be amended by adding thereto a new section, designated section seven-a, all to read as follows:

ARTICLE 1. DIVISION OF ENVIRONMENTAL PROTECTION.

§22-1-6. Director of the division of environmental protection.

1 (a) The director is the chief executive officer of the
2 division. Subject to section seven of this article and other
3 provisions of law, the director shall organize the division
4 into such offices, sections, agencies and other units of
5 activity as may be found by the director to be desirable for
6 the orderly, efficient and economical administration of the
7 division and for the accomplishment of its objects and
8 purposes. The director may appoint assistants, hearing
9 officers, clerks, stenographers and other officers, technical
10 personnel and employees needed for the operation of the
11 division and may prescribe their powers and duties and fix
12 their compensation within amounts appropriated therefor.

13 (b) The director has the power to and may designate
14 supervisory officers or other officers or employees of the
15 division to substitute for him or her on any board or
16 commission established under this code or to sit in his or

17 her place in any hearings, appeals, meetings or other
18 activities with such substitute having the same powers,
19 duties, authority and responsibility as the director.
20 Additionally, the director has the power to delegate, as he
21 or she considers appropriate, to supervisory officers or
22 other officers or employees of the division his or her
23 powers, duties, authority and responsibility relating to
24 issuing permits, hiring and training inspectors and other
25 employees of the division, conducting hearings and
26 appeals and such other duties and functions set forth in
27 this chapter or elsewhere in this code.

28 (c) The director has responsibility for the conduct of the
29 intergovernmental relations of the division, including
30 assuring:

31 (1) That the division carries out its functions in a
32 manner which supplements and complements the environ-
33 mental policies, programs and procedures of the federal
34 government, other state governments and other instru-
35 mentalities of this state; and (2) that appropriate officers
36 and employees of the division consult with individuals
37 responsible for making policy relating to environmental
38 issues in the federal government, other state governments
39 and other instrumentalities of this state concerning
40 differences over environmental policies, programs and
41 procedures and concerning the impact of statutory law
42 and rules upon the environment of this state.

43 (d) In addition to other powers, duties and responsibili-
44 ties granted and assigned to the director by this chapter,
45 the director is hereby authorized and empowered to:

46 (1) Sign and execute in the name of the state by the
47 "division of environmental protection" any contract or
48 agreement with the federal government or its departments
49 or agencies, subdivisions of the state, corporations,
50 associations, partnerships or individuals: *Provided*, That
51 the powers granted to the director to enter into agree-
52 ments or contracts and to make expenditures and obliga-

53 tions of public funds under this subdivision may not
54 exceed or be interpreted as authority to exceed the powers
55 heretofore granted by the Legislature to the various
56 commissioners, directors or board members of the various
57 departments, agencies or boards that comprise and are
58 incorporated into each secretary's department pursuant to
59 the provisions of chapter five-f of this code;

60 (2) Conduct research in improved environmental protec-
61 tion methods and disseminate information to the citizens
62 of this state;

63 (3) Enter private lands to make surveys and inspections
64 for environmental protection purposes; to investigate for
65 violations of statutes or rules which the division is
66 charged with enforcing; to serve and execute warrants and
67 processes; to make arrests; issue orders, which for the
68 purposes of this chapter include consent agreements; and
69 to otherwise enforce the statutes or rules which the
70 division is charged with enforcing;

71 (4) Acquire for the state in the name of the "division of
72 environmental protection" by purchase, condemnation,
73 lease or agreement, or accept or reject for the state, in the
74 name of the division of environmental protection, gifts,
75 donations, contributions, bequests or devises of money,
76 security or property, both real and personal, and any
77 interest in such property;

78 (5) Provide for workshops, training programs and other
79 educational programs, apart from or in cooperation with
80 other governmental agencies, necessary to ensure ade-
81 quate standards of public service in the division. The
82 director may also provide for technical training and
83 specialized instruction of any employee. Approved
84 educational programs, training and instruction time may
85 be compensated for as a part of regular employment. The
86 director is further authorized to pay out of federal or state
87 funds, or both, as such funds are available, fees and
88 expenses incidental to such educational programs, train-

89 ing and instruction. Eligibility for participation by
90 employees will be in accordance with guidelines estab-
91 lished by the director;

92 (6) Issue certifications required under 33 U.S.C. §1341 of
93 the federal Clean Water Act and may enter into agree-
94 ments in accordance with the provisions of section
95 seven-a, article eleven of this chapter. Prior to issuing any
96 certification the director shall solicit from the division of
97 natural resources reports and comments concerning the
98 possible certification. The reports and comments shall be
99 directed from the division of natural resources to the
100 director for consideration; and

101 (7) Notwithstanding any provisions of this code to the
102 contrary, employ in-house counsel to perform all legal
103 services for the director and the division, including, but
104 not limited to, representing the director, any chief, the
105 division or any office thereof in any administrative
106 proceeding or in any proceeding in any state or federal
107 court. Additionally, the director may call upon the attor-
108 ney general for legal assistance and representation as
109 provided by law.

110 (e) The director shall be appointed by the governor, by
111 and with the advice and consent of the Senate, and serves
112 at the will and pleasure of the governor: *Provided*, That
113 in lieu of appointing a director, the governor may order
114 the secretary to directly exercise the powers of the direc-
115 tor. The secretary shall designate the order in which other
116 officials of the division shall act for and perform the
117 functions of the secretary or the director during the
118 absence or disability of both the secretary and the director
119 or in the event of vacancies in both of those offices.

120 (f) At the time of his or her initial appointment, the
121 director shall be at least thirty years old and shall be
122 selected with special reference and consideration given to
123 his or her administrative experience and ability, to his or
124 her demonstrated interest in the effective and responsible

125 regulation of the energy industry and the conservation and
126 wise use of natural resources. The director shall have at
127 least a bachelor's degree in a related field and shall have
128 at least three years of experience in a position of responsi-
129 ble charge in at least one discipline relating to the duties
130 and responsibilities for which the director will be respon-
131 sible upon assumption of the office of director. The
132 director may not be a candidate for or hold any other
133 public office, may not be a member of any political party
134 committee and shall immediately forfeit and vacate his or
135 her office as director in the event he or she becomes a
136 candidate for or accepts appointment to any other public
137 office or political party committee.

138 (g) The director shall receive an annual salary of sixty-
139 five thousand dollars and shall be allowed and paid
140 necessary expenses incident to the performance of his or
141 her official duties. Prior to the assumption of the duties of
142 his or her office, the director shall take and subscribe to
143 the oath required of public officers prescribed by section
144 five, article IV of the constitution of West Virginia and
145 shall execute a bond, with surety approved by the gover-
146 nor, in the penal sum of ten thousand dollars, which
147 executed oath and bond shall be filed in the office of the
148 secretary of state. Premiums on the bond shall be paid
149 from the division funds.

ARTICLE 11. WATER POLLUTION CONTROL ACT.

§22-11-7a. Certification agreements; required provisions;
effective date.

1 If the applicant for the water quality certification seeks
2 certification of activities covered by the United States
3 army corps of engineers nationwide permit number
4 twenty-one or twenty-six issued in accordance with 33
5 U.S.C. §1344 and 33 C.F.R. Part 330 for use at or in
6 conjunction with a surface coal mining operation as
7 defined in section three, article three of this chapter, then
8 certification may be issued subject to the following

9 conditions:

10 (1) If the applicant's surface coal mining operation will
11 not impact waters of the state designated as national
12 resource waters and streams where trout naturally
13 reproduce and will not impact waters of the state which
14 are wetlands of one acre or more in size, and if the water-
15 shed above the toe of the farthest downstream permanent
16 structure authorized pursuant to an United States army
17 corps of engineers nationwide permit number twenty-one
18 or twenty-six is less than four hundred eighty acres, then
19 the director may issue a water quality certification
20 containing certain conditions including, but not limited to,
21 the following:

22 (A) All earthwork operations shall be carried out so that
23 sediment runoff and soil erosion to waters of the state are
24 controlled and minimized. Best management practices for
25 water pollution control shall be used by the surface coal
26 mining operations;

27 (B) Heavy equipment, such as bulldozers, backhoes and
28 draglines, may not be used or operated within waters of
29 the state outside of the boundaries of a permanent struc-
30 ture, unless that use cannot be avoided. If use of heavy
31 equipment within waters of the state outside the bound-
32 aries of a permanent structure is unavoidable, then the
33 work shall be performed so as to minimize resuspension of
34 sediments and disturbance to substrates, banks or riparian
35 vegetation;

36 (C) Any riprap shall be of a composition that does not
37 cause a diminution of existing water quality by adversely
38 affecting the biological, chemical or physical properties of
39 waters of the state. If riprap is used, it shall be of a
40 weight and size using current and prudent engineering
41 design; and

42 (D) Removal of riparian vegetation outside the bound-
43 aries of a permanent structure shall be minimized.

44 (2) If the applicant's surface coal mining operation will
45 not impact waters of the state designated as national
46 resource waters and streams where trout naturally
47 reproduce and will not impact waters of the state which
48 are wetlands of one acre or more in size, and if the water-
49 shed above the toe of the farthest downstream permanent
50 structure authorized pursuant to an United States army
51 corps of engineers nationwide permit number twenty-one
52 or twenty-six is less than four hundred eighty acres, then
53 the director may issue a water quality certification. The
54 director shall require that all earthwork operations shall
55 be carried out so that sediment runoff and soil erosion to
56 waters of the state are controlled and minimized, and that
57 best management practices for water pollution control
58 shall be used by the surface coal mining operations.

59 (3) If the watershed above the toe of the farthest down-
60 stream permanent structure authorized pursuant to the
61 United States army corps of engineers nationwide permit
62 number twenty-one or twenty-six is greater than or equal
63 to four hundred eighty acres, then the director may
64 further condition a water quality certification on a
65 requirement that the applicant mitigate the expected
66 water quality impacts under the following conditions:

67 (A) The water quality certification may require mitiga-
68 tion at a ratio two acres for every one acre of permanent
69 loss of waters of the state on the permitted area, except for
70 waters of the state isolated as a result of the permanent
71 structure;

72 (B) For waters of the state isolated as a result of a
73 permanent structure, the maximum mitigation ratio shall
74 be five-tenths acre of mitigation area for every one acre of
75 those isolated waters;

76 (C) The director may accept mitigation on the permitted
77 area, mitigation off the permitted area, mitigation bank-
78 ing of waters of the state, or any combination thereof, or
79 any other mitigation measure acceptable to the director;

80 (D) Upon completion of the work required by an agree-
81 ment to conduct operations authorized by this subsection,
82 the surface coal mining operation shall obtain a certifica-
83 tion from a registered professional engineer that all
84 mitigation work specified in the agreement has been
85 completed in accordance with the conditions of the water
86 quality certification. The director shall promptly review
87 the certification and provide to the surface coal mining
88 operation with notice that all mitigation work has been
89 successfully completed, or that further mitigation work is
90 necessary to meet the conditions imposed by the water
91 quality certification. The mitigation amount may not
92 exceed two hundred twenty-five thousand dollars per acre
93 of stream disturbed. Those moneys shall be deposited in
94 the stream restoration fund under the jurisdiction of the
95 division of environmental protection and any expenditures
96 from this fund after the thirtieth day of June, one thou-
97 sand nine hundred ninety-eight, shall not be authorized
98 from collections but shall only be authorized by appropri-
99 ation by the Legislature.

100 (4) The director may issue a general certification if the
101 certification consistent with state and federal laws, rules
102 and regulations, for use of United States army corps of
103 engineers nationwide permit number twenty-one or
104 twenty-six for a road crossing on the permitted area
105 directly impacting less than two hundred linear feet of
106 waters of the state.

107 (5) The director shall confer with representatives of the
108 surface coal mining industry and representatives of
109 environmental organizations with an interest in water
110 quality in developing a manual of approval options for
111 mitigation on permitted areas, mitigation off permitted
112 areas and mitigation involving banking of waters of the
113 state.

114 (6) The director has twenty working days to make a
115 determination that an application for a water quality

116 certification is administratively complete or to give
117 written notification to the applicant of specific deficien-
118 cies. The director has sixty working days to review an
119 administratively complete application for a water quality
120 certification, to issue or waive that certification, or to
121 deny that certification with specific deficiencies identi-
122 fied, and to notify the applicant of the final determination:
123 *Provided*, That public comment and public participation
124 shall be in accordance with the certification requirements
125 set forth in article three, chapter twenty-two of this code.

126 (7) The performance evaluation and research division of
127 the legislative auditor's office shall conduct a preliminary
128 performance review of the mitigation program of the
129 division of environmental protection during the interim of
130 the Legislature in the year one thousand nine hundred
131 ninety-eight. The joint committee on government and
132 finance shall authorize a study of the methods to deter-
133 mine values for stream mitigation. The joint committee in
134 authorizing the study shall set the guidelines and issues to
135 be studied. A biannual status report as to the progress of
136 study shall be provided to the joint committee on govern-
137 ment and finance on or before the tenth day of July of
138 each year and the tenth day of January of each year until
139 the study has been completed. Within thirty days of
140 completion, a copy of the study shall be provided to the
141 joint committee on government and finance. The director
142 shall by the thirty-first day of December of each year
143 provide a report to the joint committee on government and
144 finance on receipts and expenditures from the stream
145 restoration fund, the number of acreage reclaimed by the
146 division through the use of these funds and the effective-
147 ness of achieving stream restoration through the payment
148 of the mitigation amounts into the fund in lieu of reclama-
149 tion by the certificate holder.

150 (8) The proposed surface coal mining operation shall
151 comply with all state and federal laws, rules and regula-
152 tions. The director shall review each mitigation agree-

153 ment signed on or after the ninth day of March, one
154 thousand nine hundred ninety-six, to ensure compliance
155 with all the provisions of this section.

That 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 ninety 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 House of Delegates

The within this the
day of, 1998.

.....
Governor

