WEST VIRGINIA CODE CHAPTER 22 ARTICLE 22

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§22-22-1. Legislative findings; legislative statement of purpose.

(a) The Legislature finds there is property in West Virginia that is not being put to its highest productive use because it is contaminated or it is perceived to be contaminated as a result of past activity on the property.

(b) The Legislature further finds that abandonment or underutilization of contaminated or potentially contaminated industrial sites results in inefficient use of public facilities and services and increases the pressure for development of uncontaminated pristine land. Since existing industrial areas frequently have transportation networks, utilities, and an existing infrastructure, it can be less costly to society to redevelop existing industrial areas than to relocate amenities for industrial areas at pristine sites.

(c) The Legislature further finds that the existing legal structure creates uncertainty regarding the legal effect of remediation upon liability. Legal uncertainty serves as a further disincentive to productive redevelopment of brownfields. Therefore, incentives should be put in place to encourage voluntary redevelopment of contaminated or potentially contaminated sites.

(d) The Legislature further finds that an administrative program should be established to encourage persons to voluntarily develop and implement remedial plans without the need for enforcement action by the Department of Environmental Protection. Therefore, it is the purpose of this article to:

(1) Establish an administrative program to facilitate voluntary remediation activities and brownfield revitalization;

(2) Provide financial incentives to entice investment at brownfield sites; and

(3) Establish limitations on liability under environmental laws and rules for those persons who remediate sites in accordance with applicable standards established under this article.

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§22-22-2. Definitions.

As used in this article, unless otherwise provided or indicated by the context:

"Abandoned property" means real property for which the current owner cannot be determined or cannot be located or property which has been forfeited to or acquired by the State for the nonpayment of taxes pursuant to State law;

"Applicable standards", mean the remediation levels established in or pursuant to section three of this article;

"Bona fide prospective purchaser" means a person or a tenant of a person who acquires ownership, or proposes to acquire ownership, of real property after the release of hazardous substances occurred;

"Brownfield" means any property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant;

"Brownfields Revolving Fund" means the special revenue fund established to provide loans for site assessments and remediation of eligible brownfield sites;

"Contaminant" or "contamination" means any man made or man induced alteration of the chemical, physical, or biological integrity of soils, sediments, air, and surface water or groundwater resulting from activities regulated under this article, in excess of applicable standards in this chapter, including any hazardous substance, petroleum, or natural gas;

"Controls" means to apply engineering measures, such as capping or treatment, or institutional measures, such as deed restrictions, to contaminated sites;

"Department" means the West Virginia Department of Environmental Protection;

"Development Authority" means any authority as defined in §7-12-1, *et seq*. of this code or the state Development Office as defined in §2-5B-1, *et seq*. of this code.

"Engineering controls" means remedial actions directed exclusively toward containing or controlling the migration of contaminants through the environment. These include, but are not limited to, slurry walls, liner systems, caps, leachate collection systems, and groundwater recovery trenches;

"Hazardous substance" means any substance identified as a hazardous substance pursuant to the "Comprehensive Environmental Response, Compensation and Liability Act," 42 U.S.C. § 9604-9606;

"Innocent land owner" means a person who holds any title, security interest, or any other interest in a brownfield site and who acquired ownership of the real property after the

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release of hazardous substances occurred;

"Industrial activity" means commercial, manufacturing, public utility, mining, or any other activity done to further the development, manufacturing, or distribution of goods and services, intermediate and final products, and solid waste created during such activities, including, but not limited to administration of business activities; research and development; warehousing; shipping; transport; remanufacturing; stockpiling of raw materials; storage, repair, and maintenance of commercial machinery or equipment; and solid waste management;

"Institutional controls" means legal or contractual restrictions on property use that remain effective after the remediation action is completed and are used to meet applicable standards. The term may include, but is not limited to, deed and water use restrictions;

"Land-use covenant" means an environmental covenant within the meaning of §22-22B-2(4) of this code, and is a document or deed restriction issued by the Secretary on remediated sites which have attained and demonstrate continuing compliance with site-specific standards for any contaminants at the site and which is agreed to by the owner of the property. The covenant shall be recorded by deed in the office of the county clerk of the county wherein the site is situated. The document or covenant shall be included by any grantor or lessor in any deed or other instrument of conveyance or any lease or other instrument whereby real property is let for a period of one year or more, as more fully set forth in sections thirteen and fourteen of this article;

"Licensed remediation specialist" means a person certified by the Secretary pursuant to rules adopted under section three of this article as qualified to perform professional services and to supervise the remediation of contaminated sites;

"Natural gas" means natural gas, natural gas liquids, liquefied natural gas, coalbed methane, synthetic gas usable for fuel, or mixtures of natural gas and synthetic gas;

(r) "Nonresidential property" means any real property on which industrial activity is performed. This term shall not include schools, day care centers, nursing homes, or other residential-style facilities or recreational areas;

"Operator" means the person responsible for the overall operation of a facility site. A person who executes a voluntary remediation agreement with the Secretary may be considered an operator for the purpose of carrying out the activities required by the government;

"Owner" means any person owning or holding legal or equitable title or possessory interest in property or, where title or control of property was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to this state or a political subdivision of this state;

"Person" means any public or private corporation, institution, association, firm, or company

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organized or existing under the laws of this or any other state or country; the state of West Virginia; governmental agency, including federal facilities; political subdivision; county commission; municipal corporation; partnership; trust; estate; person or individuals acting individually or as a group; or any legal entity whatever;

"Petroleum" means oil or petroleum of any kind and in any form, including, without limitation, crude oil or any fraction thereof, oil sludge, oil refuse, used oil, substances or additives in the refining or blending of crude petroleum or petroleum stock;

"Practical quantitation level" means the lowest analytical level that can be reliably achieved within specified limits of precision and accuracy under routine laboratory conditions for a specified matrix. It is based on quantitation, precision, and accuracy under normal operation of a laboratory and the practical need in a compliance-monitoring program to have a sufficient number of laboratories available to conduct the analyses;

"Property" means any parcel of real property, and any improvements thereof;

"Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, migrating, dumping, or disposing of any contaminant or regulated substance into the environment, including, without limitation, the abandonment or improper discarding of barrels, containers, or any other closed receptacle containing any contaminant;

"Remediation" or "remedial action" means to cleanup, mitigate, correct, abate, minimize, eliminate, control, and contain or prevent a release of a contaminant into the environment in order to protect the present or future public health, safety, welfare, or the environment, including preliminary actions to study or assess the release;

"Remediation contractor" means any person who enters into and is carrying out a contract to cleanup, remediate, respond to or remove a release or threatened release of a contaminant and includes any person who the contractor retained or hired to provide services under a remediation contract;

"Residential" means any real property or portion thereof which is designed for the housing of human beings and does not meet the definition of "nonresidential" property set forth above;

"Risk" means the probability that a contaminant, when released into the environment, will cause an adverse effect in exposed humans or other living organisms;

"Secretary" means the Secretary of the Department of Environmental Protection or any other person to whom he or she has delegated authority or duties in accordance with §22-1-6 or §22-1-8 of this code;

"Site" means any property or portion thereof which contains or may contain contaminants and is eligible to participate in the voluntary remediation program as provided under this article;

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"Unilateral enforcement order" means a written final order issued by a federal or state agency charged with enforcing environmental law, which compels the fulfillment of an obligation imposed by law, rule against a person without their voluntary consent; and

"Voluntary remediation" means a series of measures that may be self-initiated by a person to identify and address potential sources of contamination of property and to establish that the property complies with applicable remediation standards.

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§22-22-3. Rule-making authority of the Secretary.

The Secretary, in accordance with chapter twenty-nine-a of this code, shall propose, and subsequently may amend, suspend, or rescind, rules that do the following:

(a) Establish an administrative program for both brownfield revitalization and voluntary remediation, including application procedures;

(b) Establish procedures for the licensure of remediation specialists, including, but not limited to establishing licensing fees, testing procedures, disciplinary procedures, and methods for revocation of licenses;

(c) Establish procedures for community notification and involvement;

(d) Establish risk-based standards for remediation;

(e) Establish standards for the remediation of property;

(f) Establish a risk protocol for conducting risk assessments and establishing risk-based standards. The risk protocol shall:

(1) Require consideration of existing and reasonably anticipated future human exposures based on current and reasonably anticipated future land and water uses and significant adverse effects to ecological receptor health and viability;

(2) Include, at a minimum, both central tendency and reasonable upper bound estimates of exposure;

(3) Require risk assessments to consider, to the extent practicable, the range of probabilities of risks actually occurring, the range or size of populations likely to be exposed to risk, and quantitative and qualitative descriptions of uncertainties;

(4) Establish criteria for what constitutes appropriate sources of toxicity information;

(5) Address the use of probabilistic modeling;

(6) Establish criteria for what constitutes appropriate criteria for the selection and application of fate and transport models;

(7) Address the use of population risk estimates in addition to individual risk estimates;

(8) To the extent considered appropriate and feasible by the Secretary considering available scientific information, define appropriate approaches for addressing cumulative risks posed by multiple contaminants or multiple exposure pathways;

(9) Establish appropriate sampling approaches and data quality requirements; and

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(10) Include public notification and involvement provisions so that the public can understand how remediation standards are applied to a site and provide for clear communication of site risk issues, including key risk assessment assumptions, uncertainties, populations considered, the context of site risks to other risks, and how the remedy will address site risks;

(g) Establish chemical and site-specific information, where appropriate for purpose of risk assessment. Risk assessments should use chemical and site-specific data and analysis, such as toxicity, exposure, and fate and transport evaluations in preference to default assumptions. Where chemical and site-specific data are not available, a range and distribution of realistic and plausible assumptions should be employed;

(h) Establish criteria to evaluate and approve methods for the measurement of contaminants using the practical quantitation level and related laboratory standards and practices to be used by certified laboratories;

(i) Establish standards and procedures for the use of certificates of completion, land use covenants, and other legal documents necessary to effectuate the purposes of this article; and

(j) Establish any other rules necessary to carry out the requirements and the legislative intent of this act.

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§22-22-4. Voluntary remediation program; eligibility application and fee; information available to public; confidentiality of trade secrets; information; criminal penalties; requirements of site assessment; rejection or return of application; appeal of rejection.

(a) Any site is eligible for participation in the voluntary remediation program, except those sites subject to a unilateral enforcement order, under §§ 104 through 106 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9604-9006, or which have been listed or proposed to be listed by the United States Environmental Protection Agency ("USEPA") on the priorities list of Title I of said act, or which is subject to a unilateral enforcement order under §3008 and §7003 of the Resource Conservation Recovery Act ("RCRA"), 42 U.S.C. § 6928 or § 6973, or which is subject to any unilateral enforcement order for corrective action under this chapter: *Provided*, That the release which is subject to remediation was not created through gross negligence or willful misconduct.

(b) Any person who desires to participate in the voluntary remediation program shallsubmit to the Department an application and an application fee established by the Secretary. The application shall be on a form provided by the Secretary and contain the following information: The applicant's name, address, financial and technical capability to perform the voluntary remediation, a general description of the site, a site assessment of the actual or potential contaminants prepared by a licensed remediation specialist, and all other information required by the Secretary.

(c) The Secretary shall promulgate a legislative rule establishing a reasonable application fee. Fees collected under this section shall be deposited to the credit of the Voluntary Remediation Fund in the State Treasury as established in §22-22-6 of this code.

(d) Information obtained by the Department under this article shall be available to the public, unless the Secretary certifies such information to be confidential. The Secretary may make such certification where any person shows, to the satisfaction of the Secretary, that the information or parts thereof, if made public, would divulge methods, processes, or activities entitled to protection as trade secrets. In submitting data under this article, any person required to provide such confidential data may designate the data which that person believes is entitled to protection under this section and submit such designated data separately from other data submitted under this article. This designation request shall be made in writing. Any person who divulges or discloses any information entitled to protection under this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $5,000 or imprisoned in a county jail for not more than one year, or both fined and imprisoned.

(e) The site assessment must include a legal description of the site; a description of the physical characteristics of the site, and the general operational history of the site to the extent that the history is known by the applicant; and information of which the applicant is aware concerning the nature and extent of any known contamination at the site and

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immediately contiguous to the site, or wherever the contamination came to be located.

(f) The Secretary may reject or return an application if:

(1) A federal requirement precludes the eligibility of the site;

(2) The application is not complete and accurate; or

(3) The site is ineligible under the provisions of this article.

(g) The Secretary shall act upon all applications within 45 days of receipt, unless an extension of time is mutually agreed to and confirmed in writing. If an application is returned by the Secretary because it is not complete or accurate, the Secretary shall provide the applicant a list of all information that is needed to make the application complete or accurate. The applicant may resubmit an application without submitting an additional application fee.

(h) If the Secretary rejects the application, then he or she shall notify the applicant that the application has been rejected and provide an explanation of the reasons for the rejection. The applicant may, within 25 days of rejection, indicate his or her desire to resubmit the application. Upon final determination by the Secretary, if the application is rejected, the Secretary shall return one half of the application fee. The applicant may appeal the Secretary's rejection of the application to the Environmental Quality Board established under §22B-3-1, *et seq*. of this code.

(i) Upon withdrawal of an application, the applicant is entitled to the refund of one half of the application fee, provided the application has not been accepted by the Secretary.

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§22-22-5. Brownfields Revolving Fund applicant eligibility; loans; remediation process; and public notification.

(a) A person may be eligible for Brownfields Revolving Fund moneys when environmental remediation is undertaken pursuant to this article and the person did not cause or contribute to the contamination on the property. A person receiving Brownfields Revolving Fund moneys shall comply with the appropriate standards established by the Secretary pursuant to this article and rules promulgated hereunder.

(b) After conferring with the Secretary, the person may apply to the Secretary for a site assessment or remediation loan under §22-22-6 of this code. An application for money from the Brownfields Revolving Fund must be submitted along with an application fee to be established by the Secretary.

(c) Brownfields being remediated by persons who did not cause or contribute to the contamination of the site are also eligible for consideration for remediation loans established under §15-31-1, *et seq*. of this code.

(d) Persons receiving Brownfields Revolving Fund moneys to perform remediation and revitalization of brownfield sites shall comply with the following public notice and involvement requirements:

(1) Submit a notice of intent to remediate to the Department. This notice shall provide, to the extent known, a brief description of the location of the site; a listing of the contaminants involved; and the proposed remediation measures. The Department shall publish an acknowledgment noting the receipt of the notice of intent in a Department publication of general circulation. At the time a notice of intent to remediate a site is submitted to the Department, a copy of the notice shall be provided to the municipality and the county in which the site is located. A summary of the notice of intent shall be published in a newspaper of general circulation serving the area in which the site is located;

(2) Provide a 30-day public, county, and municipal comment period for the notice required by this subsection during which the public, county, and municipality may request to be involved in the development of the remediation and reuse plans for the site. If requested by the public, county, municipality, or the Secretary, the person undertaking the remediation shall develop and implement a public involvement program plan which meets the requirements set forth by the Secretary; and

(3) Adhere to other public notice requirements as stipulated by federal or other grantors that provide moneys to the Brownfields Revolving Fund, or as promulgated in the rules developed by the Secretary.

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§22-22-6. Voluntary remediation administrative fund established; voluntary remediation fees authorized; Brownfields revolving fund established; disbursement of funds moneys; employment of specialized persons authorized.

(a) There is hereby reauthorized and continued in the State Treasury special revenue fund known as the Voluntary Remediation Administrative Fund. The fund shall operate as a special fund whereby all deposits and payments thereto do not expire to the General Revenue Fund but shall remain in the fund and be available for expenditure in succeeding fiscal years. This fund shall consist of fees collected by the Secretary in accordance with the provisions of this article as well as interest earned on investments made from moneys deposited in the fund. Moneys from this fund shall be expended by the Secretary for the administration, licensing, enforcement, inspection, monitoring, planning, research, and other activities required by this article.

The Secretary shall promulgate legislative rules in accordance with the provisions of §29A-3-1 *et seq*. of this code establishing a schedule of voluntary remediation fees applicable to persons who conduct activities subject to the provisions of this article. The fees may include an appropriate assessment of other program costs not otherwise attributable to any specific site but necessary for the administrative activities required to carry out the provisions of this article.

(b) There is hereby reauthorized and continued in the State Treasury a special revenue fund known as the Brownfields Revolving Fund. The fund shall be comprised of moneys allocated to the state by the federal government expressly for the purposes of establishing and maintaining a state brownfields redevelopment revolving fund, all receipts from loans made from the fund, any moneys appropriated by the Legislature, all income from the investment of moneys held in the fund, and all other sums designated for deposit to the fund from any source, public or private. The fund shall operate as a special fund whereby all deposits and payments thereto do not expire to the General Revenue Fund but shall remain in the account and be available for expenditure in succeeding fiscal years. Moneys in the fund, to the extent that moneys are available, shall be used to make loans to persons to finance site assessments and remediation of eligible brownfield sites and such other activities as authorized by any federal grant received or any legislative appropriation: *Provided*, That moneys in the fund may be utilized to defray those costs incurred by the Department in administering the provisions of this subsection. The Secretary shall promulgate rules in accordance with the provisions of §29A-3-1 *et seq*. of this code, to govern the disbursement of moneys from the fund, and establish a state brownfields redevelopment assistance program to direct the distribution of loans from the fund, and establish the interest rates and repayment terms of any loans: *Provided, however*, That amounts in the fund, appropriated by the West Virginia Legislature, and which are found from time to time to exceed the amount needed for the purposes set forth in this article, may be transferred to other accounts or funds and redesignated for other purposes through appropriations of the Legislature. Moneys from any other source, public or private, shall remain in the fund.

In order to carry out the administration and management of the fund, the Department may

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employ officers, agents, advisors, and consultants, including attorneys, financial advisors, engineers, other technical advisors, and public accountants and, not withstanding any provisions of this code to the contrary, determine their duties and compensation without the approval of any other agency or instrumentality.

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§22-22-7. Voluntary remediation agreement; required use of licensed remediation specialist; required provisions of a voluntary remediation agreement; failure to reach agreement; appeal to the Environmental Quality Board; no enforcement action when subject of agreement.

Upon acceptance of an application, the Secretary shall enter into an agreement with the applicant for the remediation of the site which sets forth the following:

(a) A person desiring to participate in the voluntary remediation program shall enter into a voluntary remediation agreement that sets forth the terms and conditions of the evaluation of the reports and the implementation of work plans;

(b) Any voluntary remediation agreement approved by the Secretary shall provide for the services of a licensed remediation specialist for supervision of all activities described in the agreement;

(c) A voluntary remediation agreement shall provide for cost recovery of all reasonable costs incurred by the Department in review and oversight of the person's work plan and reports as a result of field activities or attributable to the voluntary remediation agreement, which are in excess of the fees submitted by the applicant along with a schedule of payments; appropriate tasks, deliverables, and schedules for performance of the remediation; a listing of all statutes and rules for which compliance is mandated; a description of any work plan or report to be submitted for review by the Secretary, including a final report that provides all information necessary to verify that all work contemplated by the agreement has been completed; the licensed remediation specialist's supervision of remediation contractors; and a listing of the technical standards to be applied in evaluating the work plans and reports, with reference to the proposed future land use to be achieved. The voluntary remediation agreement may also provide for alternate dispute resolutions between the parties to the agreement, including, but not limited to, arbitration or mediation of any disputes under this agreement;

(d) A voluntary remediation agreement may not be modified or amended, unless the amendment or modification is reduced to writing and mutually agreed upon by the parties to the agreement: *Provided*, That when the Secretary determines that there is an imminent threat to the public, he or she may unilaterally modify or amend the agreement;

(e) Upon acceptance of an application, the Secretary and the applicant shall develop a remediation agreement. If an agreement is not reached between the applicant and the Secretary on or before the 31st day after the application has been accepted, either party may withdraw from negotiations. If this occurs, the agency retains the application fee. The applicant may appeal the failure to reach agreement to the Environmental Quality Board as established under §22B-3-1, *et seq*. of this code. By mutual agreement, when it becomes impractical to reach an agreement within 31 days, the time limit may be extended in writing; and

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(f) The Department may not initiate an enforcement action against a person who is in compliance with this section for the contamination that is the subject of the voluntary remediation agreement or for the activity that resulted in the contamination, unless there is an imminent threat to the public.

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§22-22-8. Voluntary remediation work plans and reports.

After signing a voluntary remediation agreement, the person undertaking remediation shall prepare and submit the appropriate work plans and reports to the Secretary. The Secretary shall review and evaluate the work plans and reports for accuracy, quality, and completeness. The Secretary may approve a voluntary remediation work plan or report or disapprove and notify the person of additional information needed to obtain approval.

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§22-22-9. Termination of agreement; cost of recovery; legal actions.

The person undertaking remediation may, in his or her sole discretion, terminate the agreement as provided by the terms of the agreement and by giving 15 days advance written notice of termination. Only those costs incurred or obligated by the Secretary before notice of termination of the agreement are recoverable, if the agreement is terminated. The termination of the agreement does not affect any right the Secretary may have under any other law to recover costs. The person undertaking the remediation must pay the Department's costs associated with the voluntary remediation within 31 days after receiving notice that the costs are due and owing. The Secretary may bring an action in Kanawha County circuit court or in the circuit court in the county wherein the property is situated to recover the amount owed to the Department and reasonable legal expenses.

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§22-22-10. Inspections; right of entry; sampling; reports and analyses.

(a) The Secretary, upon presentation of proper credentials, may enter any building, property, premises, place, or facility where brownfield or voluntary remediation activities are being or have been performed for the purpose of making an inspection to ascertain the compliance by any person with the provisions of this article or the rules promulgated by the Secretary.

(b) The Secretary shall make periodic inspections at sites subject to this article. After an inspection is made, a report shall be filed with the Secretary and a copy shall be provided to the person who is responsible pursuant to the voluntary agreement for remediation activities. The reports shall not disclose any confidential information protected under the provisions of §22-22-4(d) of this code. The inspection reports shall be available to the public in accordance with the provisions of §29B-1-1, *et seq*. of this code.

(c) The Secretary may, upon presentation of proper credentials, enter any building, motor vehicle, property, premises, or site where brownfield or voluntary remediation activities are being or have been performed and take samples of wastes, soils, air, surface water, and groundwater. In taking such samples, the Secretary may utilize sampling methods necessary in exercising good scientific technique. Following the taking of any sample, the Secretary shall give the person responsible in the voluntary agreement for remediation activities a receipt describing the sample obtained and, if requested, a portion of each sample equal in volume or weight to the portion retained. The Secretary shall promptly provide a copy of any analysis made to the responsible person named in the voluntary agreement.

(d) Upon presentation of proper credentials, the Secretary shall be given access to all records relating to a voluntary remediation.

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§22-22-11. Licensed remediation specialist, licensure procedures.

(a) A person may not practice as a licensed remediation specialist without a license issued by the Secretary. Any violation of this provision shall be subject to the enforcement orders set forth in §22-22-12 of this code.

(b) To obtain a license, a person must apply to the Secretary in writing on forms approved and supplied by the Secretary. Each application for examination for a license shall contain:

(1) The full name of the person applying for the license;

(2) The principal business address of the applicant;

(3) All formal academic education and experience of the applicant to demonstrate professional expertise of the applicant;

(4) If waiver of the examination is being requested, any license or certification that the person desires to be considered as part of the waiver request;

(5) The examination fee; and

(6) Any other necessary information prescribed by the Secretary.

(c) The Secretary shall establish the date, time, and location of licensed remediation specialist examinations.

(d) The applicant shall demonstrate that he or she possesses a practical knowledge of the remediation activities; procedures necessary to remediate a site; and the management of contaminants at a site, including, but not limited to, site investigation, health and safety protocol, quality assurance, feasibility studies and remedial design.

(e) If the Secretary does not certify the remediation specialist applicant, the Secretary shall inform the applicant in writing of the reasons therefor. The Secretary may not deny a license without cause.

(f) It is the licensed remediation specialist's duty to protect the safety, health, and welfare of the public as set forth in this article, in the performance of his or her professional duties. The licensed remediation specialist is responsible for any release of contaminants during remediation activities undertaken pursuant to the approved remediation agreement, work plans, or reports. If a licensed remediation specialist faces a situation where he or she is unable to meet this duty, the licensed remediation specialist may either sever the relationship with the client or employer or refuse professional responsibility for work plan, report, or design. The specialist shall notify the Department if there is a threat to the environment or the health, safety, or welfare of the public.

(g) A licensed remediation specialist shall only perform assignments for which the specialist

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is qualified by training and experience in those specific technical fields; be objective in work plans, reports, and opinions; and avoid any conflict of interest with employer, clients, and suppliers. A licensed remediation specialist shall not solicit or accept gratuities, directly or indirectly, from contractors, agents, or other parties dealing directly with the employer or client in regard to professional services being performed at the work site; accept any type of bribe; falsify or permit misrepresentation of professional qualifications; intentionally provide false information to the Secretary; or knowingly associate with a person who is engaging in business or professional practices of a fraudulent or dishonest nature.

(h) A licensed remediation specialist shall not charge any special fees above usual and customary professional rates for being licensed.

(i) The license issued by the Secretary may be renewed every two years for any licensed remediation specialist in good standing. The Secretary, by rule, shall establish license fees.

(j) The Secretary may revoke a license; suspend a license for not more than five years; or impose lesser sanctions as may be appropriate for acts or omissions in violation of this article.

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§22-22-12. Enforcement orders for licensed remediation specialists; cease and desist order; criminal penalties.

(a) If the Secretary, upon inspection, investigation, or through other means observes, discovers, or learns that a licensed remediation specialist has violated the provisions of this article or any rules promulgated hereunder, the Secretary may:

(1) Issue an order stating with reasonable specificity the nature of the violation and requiring compliance immediately or within a specified time. An order under this section includes, but is not limited to, orders suspending or revoking licenses, orders requiring a person to take remedial action, or cease and desist orders; or

(2) Request the prosecuting attorney of the county in which the alleged violation occurred bring a criminal action as provided for herein.

(b) Any person issued an order may file a request for reconsideration with the Secretary within seven days of the receipt of the order. The Secretary shall conduct a hearing on the merits of the order within 10 days of the filing of the request for reconsideration. The filing of a notice of request for reconsideration does not stay or suspend the execution or enforcement of the order.

(c) Any licensed remediation specialist who fraudulently misrepresents that work has been completed and such action results in an unjustified and inexcusable disregard for the safety of others, thereby placing another in imminent danger or contributing to ongoing harm to the environment, is guilty of a felony and, upon conviction thereof, shall be fined not more than $50,000, or imprisoned not less than one nor more than two years, or both.

(d) If any person associated with remediation of a brownfield or voluntary remediation site engages in fraudulent acts or representations to the Department, he or she is guilty of a felony and, upon conviction thereof, shall be fined not more than $50,000 or imprisoned not less than one nor more than two years, or both.

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§22-22-13. Certificate of completion.

(a) The licensed remediation specialist shall issue a final report to the person undertaking the voluntary remediation when the property meets the applicable standards and all work has been completed as contemplated in the voluntary remediation agreement or the site assessment shows that all applicable standards are being met. Upon receipt of the final report, the person may seek a certificate of completion from the Secretary.

(b) The Secretary may delegate the responsibility for issuance of a certificate of completion to a licensed remediation specialist in limited circumstances, as specified by rule pursuant to this article.

(c) The certificate of completion shall contain a provision relieving a person who undertook the remediation and subsequent successors and assigns from all liability to the state as provided under this article which shall remain effective as long as the property complies with the applicable standards in effect at the time the certificate of completion was issued. This certificate is subject to reopener provisions of section fifteen of this article and may, if applicable, result in a land-use covenant as provided in section fourteen of this article.

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§22-22-14. Land-use covenant; criminal penalties.

(a) The Secretary shall establish by rule, criteria for deed recordation of land-use covenants and containing all necessary deed restrictions. The Secretary shall cause all land-use covenants to appear in the chain of title by deed to be properly recorded in the office of the county clerk where the remediation site is located. If institutional and engineering controls are used, in whole or in part, to achieve a remediation standard, the Secretary shall direct that a land-use covenant be applied. The covenant shall include whether residential or nonresidential exposure factors were used to comply with the site-specific standard. The covenant shall contain a provision relieving the person who undertook the remediation and subsequent successors and assigns from all civil liability to the state as provided under this article and shall remain effective as long as the property complies with the applicable standards in effect at the time the covenant was issued.

(b) Whoever knowingly violates a land-use covenant by converting nonresidential property to residential property is guilty of a felony, and, upon conviction thereof, shall be fined not more than $25,000, imprisoned for not more than five years, or both.

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§22-22-15. Reopeners.

Any person who completes remediation in compliance with this article shall not be required to undertake additional remediation actions for contaminants subject to the remediation, unless the Secretary demonstrates that:

(a) Fraud was committed in demonstrating attainment of a standard at the site that resulted in avoiding the need for further remediation of the site;

(b) New information confirms the existence of an area of a previously unknown contamination which contains contaminants that have been shown to exceed the standards applied to the previous remediation at the site;

(c) The level of risk is increased significantly beyond the established level of protection at the site due to substantial changes in exposure conditions, such as a change in land use or new information is obtained about a contaminant associated with the site which revises exposure assumptions beyond the acceptable range. Any person who changes the use of the property causing the level of risk to increase beyond established protection levels shall be required by the Department to undertake additional remediation measures under the provisions of this article;

(d) The release occurred after the effective date of this article on a site not used for industrial activity prior to the effective date of this article; the remedy relied, in whole or in part, upon institutional or engineering controls instead of treatment or removal of contamination; and treatment, removal, or destruction has become technically and economically practicable; or

(e) The remediation method failed to meet the remediation standard or combination of standards.

In the event that any of the foregoing circumstances occur, the remediation agreement will be reopened and revised to the extent necessary to return the site to its previously agreed to state of remediation or other appropriate standard.

WV Legislature

§22-22-16. Duty of assessor and citizens to notify Secretary when change of property use occurs.

If an assessor in any county becomes aware of a change of remediated property use from nonresidential property to residential, the assessor shall check the land record of the county to ascertain if a land-use covenant appears to have been violated. Should it appear that a violation has occurred, the assessor shall notify the Secretary in writing of the suspected violation. If any citizen becomes aware of a change of property use from nonresidential to residential, the citizen may check the land record of the county to ascertain if a land use covenant appears to have been violated and may notify the Secretary in writing. The Secretary shall then investigate and proceed with any necessary enforcement action.

WV Legislature

§22-22-17. Public notification for brownfields.

[Repealed.]

WV Legislature

§22-22-18. Environmental liability protection.

(a) Any person demonstrating compliance with the applicable standards established in section three of this article, whether by remediation or where the site assessment shows that the contamination at the site meets applicable standards, shall be relieved of further liability for the remediation of the site under this chapter. Contamination identified in the remediation agreement submitted to and approved by the Department is not subject to citizen suits or contribution actions. The protection from further remediation liability provided by this article applies to the following persons:

(1) The current or future owner or operator of the site, including development authorities and fiduciaries who participated in the remediation of the site;

(2) A person who develops or otherwise occupies the site;

(3) A successor or assign of any person to whom the liability protection applies;

(4) A public utility, as defined in §24-1-2 of this code, and for the purpose of this article, a utility engaged in the storage and transportation of natural gas, to the extent the public utility performs activities on the site;

(5) A remediation contractor;

(6) A licensed remediation specialist; and

(7) A lender or developer who engages in the routine practices of commercial lending, including, but not limited to, providing financial services, holding of security interests, workout practices, foreclosure, or the recovery of funds from the sale of a site.

(b) A person shall not be considered a person responsible for a release or a threatened release of contaminants simply by virtue of conducting or having a site assessment conducted. Nothing in this section relieves a person of any liability for failure to exercise due diligence in performing a site assessment.

(c) The Secretary may, consistent with programs developed under federal law, make a determination to limit the liability of lenders, innocent purchasers or landowners, de minimis contributors, or others who have grounds to claim limited responsibility for a containment or cleanup that may be required pursuant to the Hazardous Waste Management Act §22-18-1, *et seq*. of this code, the Water Pollution Control Act §22-11-1, *et seq*. of this code, the Groundwater Protection Act §22-12-1, *et seq*. of this code, or any other applicable law.

(d) A person who is a bona fide prospective purchaser shall not be held liable for a containment or cleanup that may be required at a brownfield site pursuant to the Hazardous Waste Management Act §22-18-1, *et seq*. of this code, the Water Pollution Control Act §22-11-1, *et seq*. of this code, the Groundwater Protection Act §22-12-1, *et seq*. of this code, or any other applicable law, if:

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(1) The person did not cause, contribute, or consent to the release or threatened release;

(2) The person is not liable or potentially liable through any direct or indirect familial relationship or any contractual, corporate, or financial relationship or is not the result of a reorganization of a business entity that was potentially liable;

(3) The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances; and

(4) The person does not impede the performance of any response action.

(e) A person who is an innocent land owner who holds title, security interest, or any other interest in a brownfield site shall not be held liable for a containment or cleanup that may be required at a brownfield site pursuant to the Hazardous Waste Management Act §22-18-1, *et seq*. of this code, the Water Pollution Control Act §22-11-1, *et seq*. of this code, the Groundwater Protection Act §22-12-1, *et seq*. of this code, or any other applicable law if:

(1) The person did not cause, contribute, or consent to the release or threatened release;

(2) The person is not liable or potentially liable through any direct or indirect familial relationship or any contractual, corporate, or financial relationship or is not the result of a reorganization of a business entity that was potentially liable;

(3) The person made all appropriate inquiries into the previous uses of the facility in accordance with generally accepted good commercial and customary standards and practices, including those established by federal law;

(4) The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances;

(5) The person does not impede the performance of any response action; and either

(6) At the time the person acquired the interest, he or she did not know and had no reason to know, that any hazardous substances had been or were likely to have been disposed of on, in, or at the site, or

(7) The person is a government entity that acquired the site by escheat or through other involuntary transfer or acquisition.

(f) A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from real property that is not owned by that person shall not be

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considered liable for a containment or cleanup that may be required pursuant to the Hazardous Waste Management Act §22-18-1, *et seq*. of this code, the Water Pollution Control Act §22-11-1, *et seq*. of this code, the Groundwater Protection Act §22-12-1, *et seq*. of this code, or any other applicable law if the person did not cause, contribute, or consent to the release or threatened release, if the person is not liable or potentially liable through any direct or indirect familial relationship or any contractual, corporate, or financial relationship or is not the result of a reorganization of a business entity that was potentially liable, and if such person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions at the facility from which there has been a release.

(g) The provisions of this section shall not otherwise limit the authority of the Secretary to require any person responsible for the contamination or pollution to contain or remediate sites where solid or hazardous waste or other substances have been improperly managed.

WV Legislature

§22-22-19. Establishing and limiting the responsibilities of remediation contractors.

(a) A person who is engaged in the business of remediation contractor under this article is not responsible for a release or threatened release of contaminants at the site described in the voluntary remediation agreement for work properly performed pursuant to the agreement.

(b) A person who is engaged in the business of remediation contractor under this article is not liable for any harm, damage or injury caused by a release of a contaminant which occurred prior to the contractor undertaking work at the site.

(c) Limitation of liability, pursuant to subsections (a) and (b) of this section does not apply to a release or threatened release of contaminants at the site described in the voluntary remediation agreement that is directly caused by an act or omission which constitutes gross negligence or by the willful misconduct of the remediation contractor.

(d) A remediation contractor is not required to obtain a permit for remediation activities, if a permit is required under article five, eleven, fifteen or eighteen of this chapter. However, an owner or operator of the site to be remediated is not relieved of the permit requirements, if any, for remediation activities undertaken at the site. A remediation contractor must comply with all applicable state and federal laws in the transportation, treatment, storage and disposal of contaminants generated as a consequence of the remediation activities.

(e) A remediation contractor is not a "generator" for the purposes of the generator assessments imposed pursuant to article twenty of this chapter.

WV Legislature

§22-22-20. Affirmative defenses.

Any person who is alleged to have violated an environmental law or the common law equivalent, which occurred while acting pursuant to this article, may affirmatively plead the following in response to an alleged violation:

(a) An act of God;

(b) An intervening act of a public agency;

(c) Migration from property owned by a third party;

(d) Actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the environmental laws or at the direction of the Department;

(e) An act of a third party who was not an agent or employee of the lender, fiduciary, developer, remediation contractor, or development authority; or

(f) If the alleged liability for a lender, fiduciary, developer, or development authority arises after foreclosure, and the lender, fiduciary, developer, or development authority exercised due care with respect to the lender's, fiduciary's, developer's, or development authority's knowledge about the contaminants, and took reasonable precautions based upon such knowledge against foreseeable actions of third parties and the consequences arising therefrom. A lender, fiduciary, developer, remediation contractor, or development authority may avoid liability by proving any other defense which may be available to it.

WV Legislature

§22-22-21. Savings clause.

Nothing in this article shall affect the rights, duties, defenses, immunities or causes of action under other statutes or the common law of this state which may be applicable to persons conducting remediation of a site.

WV Legislature