WEST VIRGINIA CODE CHAPTER 22 ARTICLE 32

WV Legislature

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

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

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

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

WV Legislature

§22-32-2. Short title.

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

WV Legislature

§22-32-3. Definitions.

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

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

(b) “Decommission” or “decommissioning” means:

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

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

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

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

(c) “Department”, “agency”, and “DEP” mean the West Virginia Department of Environmental Protection.

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

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

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

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

WV Legislature

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

WV Legislature

§22-32-4. Bonding required.

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

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

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

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

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

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

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

(d) If a property owner and the owner of a wind generation facility or solar generation facility and to the extent necessary any local governing body reach an agreement concerning: (1) Alternative restoration of buildings, equipment, other associated property (including appurtenant land, improvements, and personal property), cabling, electrical components, roads, or any other associated facilities (instead of removal); or (2) alternative plans for reclamation of surface lands; or (3) both, the agreement must be provided to the DEP for review and approval by the Cabinet Secretary or his assigns. The DEP must approve or deny the alternative plan submission within 90 days of receipt. Decommissioning agreements which legally bind exempt parties are not subject to approval or modification by DEP but are subject to review and comment by DEP.

WV Legislature

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

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

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

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

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

(2) Except as provided in subsection (i) of this section, if a wind generation facility or solar generation facility commenced commercial operation after July 1, 2021, the operator shall submit the decommissioning bond to the DEP within one year of the date on which the wind generation facility or solar generation facility first produces electricity for consumer or industrial use.

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

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

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

(3) The facility is legally bound by a decommissioning agreement, based upon a qualified independent party and executed before the effective date of this article; or is or was granted a siting certificate or other authorization to construct by the Public Service Commission, conditioned upon the execution of such agreement before the effective date of this article: Such facilities are exempt, unless or until the facility, is (A) found to be in breach of such

WV Legislature

agreement or such agreement is found to be unenforceable, (B) sold or transferred to a party or parties not bound under such agreement, or (C) substantially expanded in total disturbed acreage.

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

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

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

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

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

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

WV Legislature

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

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

WV Legislature

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

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

(1) Fees and penalties collected in accordance with the article; and

(2) Interest income earned on the account.

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

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

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

WV Legislature

§22-32-6. Bond release.

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

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

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

WV Legislature

§22-32-7. Rulemaking.

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

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

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

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

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

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

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

WV Legislature

§22-32-8. Decommissioning agreements.

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

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

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

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

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

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

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

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

(h) Required notices;

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

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

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

WV Legislature