WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1996

---

ENROLLED

COM. SUB. FOR HOUSE BILL No. 4605

(By Delegate MR. SPEAKER, MR. CHAMBERS)
AND Delegate ASHLEY
[BY REQUEST OF THE EXECUTIVE]

Passed MARCH 9, 1996

In Effect JULY 1, 1996
AN ACT to amend and reenact section three, article eleven-b, chapter seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend chapter twenty-two of said code by adding thereto a new article, designated article twenty-two; and to amend and reenact section four, article fifteen, chapter thirty-one of said code, all relating generally to remediation of contaminated property; adding the remediation of contaminated property as projects eligible for tax increment financing; legislative findings and purpose; defining terms; authorizing the director to promulgate legislative rules; establishing the voluntary remediation program; establishing eligibility requirements and the application process for the remediation of contaminated property; authorizing the director to establish application fees and other costs; making information available to the public; providing for confidentiality of trade secrets; creating criminal penalties for violating confidentiality of trade secrets; establishing requirements for site assessments; establishing the criteria under which the director may reject an application; providing for notice and partial return of application fee if the application is denied; establishing brownfield remediation program, application process and fee; providing for application for remediation loans for brownfield sites; allowing access to information in possession
of the director; creating voluntary remediation administrative fund; providing for disbursements from the fund; establishing brownfield revolving fund; providing for disbursements from the fund; authorizing employment of specialized persons to administer and manage the fund; providing for voluntary remediation agreements; requiring the use of licensed remediation specialist; establishing the requirements of voluntary remediation agreements; creating applicants right to appeal to the environmental quality board upon failure to reach a voluntary remediation agreement; providing that no enforcement action will be undertaken when property is in compliance with a voluntary remediation agreement unless there is imminent threat to the public; requiring that voluntary remediation work plans and reports must be submitted to the director for review; allowing the remediator to terminate the remediation agreement; allowing the director to recover the remediation costs incurred prior to termination; providing for suit in circuit court of Kanawha county or the circuit court where the site is situated for recovery of clean-up costs; authorizing the director to take samples at brownfield and voluntary remediation sites, and share the samples with the remediator; authorizing the director to inspect and make reports; providing the director access to all records relating to brownfield and voluntary remediation sites; requiring license issued by the director in order to work as a remediation specialist; specifying licensure requirements; specifying licensed remediation specialist duties, responsibilities and limitations; providing for licenses renewal, revocation or suspension; providing for civil and criminal penalties, license revocation and enforcement orders for licensing remediation specialists; providing for issuance of certificate of completion; providing for land-use covenants to be issued by the director; providing that the land-use covenant be recorded in the deed; establishing criminal penalty for violating land-use covenants; providing for reopening a remediation agreement for a brownfield site for future action; requiring the assessors of each county and allowing citizens to notify the director when use of property changes; providing for notification of the public when a remediation site is being considered; providing for environmental liability protection; establishing and limiting the responsibilities of remediation contractors; establishing affirmative defenses;
providing that nothing in this article effects the rights, duties, immunities, other defenses or causes of action; and adding site assessment and site remediation cost to the definition of "costs of establishing an industrial development project".

Be it enacted by the Legislature of West Virginia:

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

CHAPTER 7. COUNTY COMMISSIONS AND OFFICERS.

ARTICLE 11B. WEST VIRGINIA TAX INCREMENT FINANCING ACT.

§7-11B-3. Definitions.

As used in this article, the term or phrase:

(a) "Agency" means a county or municipal development agency established by section one, article twelve, chapter seven of this code.

(b) "Base assessed value" means the taxable assessed value of real and tangible personal property of a project developer within a development project area as shown upon the landbook and personal property records of the assessor on the first day of July of the year preceding the effective date of the order authorizing the tax increment financing plan.

(c) "Current assessed value" means the annual taxable assessed value of real and tangible personal property of a project developer within a development project area as shown upon the landbook and personal property records of the assessor.

(d) "Development project" means a project undertaken by a county commission in a development project area in accordance with a tax increment financing plan.

(e) "Development project area" means an area to be
designated by one or more agencies as a development project area, which may include one or more counties, municipalities or combination thereof.

(f) "Private project" means any project which is subject to ad valorem property taxes in the state undertaken by a project developer in accordance with a tax increment financing plan in a development project area.

(g) "Project" means any facility requiring an investment of capital, including extensions, additions or improvements to existing facilities including water or waste water facilities, and the remediation of contaminated property as provided for in article twenty-two of chapter twenty-two of this code, but does not include performance of any governmental service by a county or municipal government or any housing facility to be rented or used as a permanent residence.

(h) "Project developer" means any person or corpora- tion which engages in the development of projects in the state.

(i) "Tax increment" means the amount of tax attributable to the amount by which the current assessed value of a private project in a development project area exceeds the base assessed value, if any, of such private project, less the portion of tax allocated to the state.

(j) "Tax increment obligation" means any bond or note issued by a county commission in accordance with section six of this article.

(k) "Tax increment financing plan" means a plan proposed by either an agency or a project developer requesting that a specific development project be developed in conjunction with a private project of such project developer, which plan is approved by the county commission for the county in which the development project area is located in accordance with the procedures set forth in section four of this article.

(l) "Taxing unit" means a municipal corporation, a county commission or a county board of education.
CHAPTER 22. ENVIRONMENTAL RESOURCES.

ARTICLE 22. VOLUNTARY REMEDIATION AND REDEVELOPMENT ACT.

§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 under use 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 division 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.

1 As used in this article, unless otherwise provided or
2 indicated by the context:
3
4 (a) "Applicable standards", mean the remediation
5 levels established in or pursuant to section three of this
6 article;
7
8 (b) "Brownfield" means any industrial or commercial
9 property which is abandoned or not being actively used
10 by the owner as of the effective date of this article, but
11 shall not include any site subject to a unilateral enforce-
12 ment order under §104 through §106 of the "Comprehen-
13 sive Environmental Response, Compensation and Liability
14 Act", 94 Stat. 2779, 42 U.S.C. §9601, as amended, or
15 which has been listed or proposed to be listed by the Unit-
16 ed States environmental protection agency on the priori-
17 ties list of Title I of said act, or subject to a unilateral en-
18 forcement order under §3008 and §7003 of the "Resource
19 Conservation Recovery Act" or any unilateral enforcement
20 order for corrective action under this chapter;
21
22 (c) "Certified laboratory" means any laboratory ap-
23 proved by the director under laboratory certification rules
24 adopted pursuant to section fifteen, article one of this
25 chapter;
26
27 (d) "Contaminant" or "contamination" means any
28 man made or man induced alteration of the chemical,
29 physical or biological integrity of soils, sediments, air and
30 surface water or groundwater resulting from activities
31 regulated under this article, in excess of applicable stan-
32 dards in this chapter, including any hazardous substance,
33 petroleum, or natural gas;
34
35 (e) "Controls" means to apply engineering measures,
36 such as capping or treatment, or institutional measures,
37 such as deed restrictions, to contaminated sites;
38
39 (f) "Development authority" means any authority as
40 defined in article twelve, chapter seven of this code or the
41 state development office as defined in article two, chapter
42 five-b of this code.
43
44 (g) "Director" means the director of the division of
environmental protection or such other person to whom
the director has delegated authority or duties pursuant to
this article;

(h) "Division" means the division of environmental
protection of the state of West Virginia;

(i) "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;

(j) "Hazardous substance" means any substance identi-
fied as a hazardous substance pursuant to the "Compre-
hensive Environmental Response, Compensation and Liabil-

(k) "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;

(l) "Industrial activity" means commercial, manufac-
turing, public utility, mining or any other activity done to
further either the development, manufacturing or distribu-
tion 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, trans-
port, remanufacturing, stockpiling of raw materials, stor-
age, repair and maintenance of commercial machinery or
equipment and solid waste management;

(m) "Land-use covenant" means a document or deed
restriction issued by the director on remediated sites which
have attained and demonstrate continuing compliance with
site-specific standards for any contaminants at the site.
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 con-
vveyance 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; 

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

(o) "Mitigation measure" means any remediation action performed by a person prior to or during implementation of a remediation plan to protect human health and the environment; 

(p) "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; 

(q) "Nonresidential property" means any real property on which commercial, industrial, manufacturing or any other activity is done to further the development, manufacturing or distribution of goods and services, intermediate and final business activities, research and development, warehousing, shipping, transport, remanufacturing, stockpiling of raw materials, storage, repair and maintenance of commercial machinery and equipment, and solid waste management. This term shall not include schools, day care centers, nursing homes, or other residential-style facilities or recreational areas; 

(r) "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, or any person who owned the property before the conveyance; 

(s) "Operator" means the person responsible for the overall operation of a facility site; 

(t) "Person" means any public or private corporation, institution, association, firm or company organized or
existing under the laws of this or any other state or country; 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;

(u) "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;

(v) "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;

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

(x) "Related" means the persons who are related to the third degree of consanguinity or marriage;

(y) "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;

(z) "Remediation" 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;

(aa) "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;

(bb) "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;

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

(dd) "Site" means any property or portion thereof which contains or may contain contaminants and is eligible for remediation as provided under this article;

(ee) "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

(ff) "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.

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

Within one year after the effective date of this section, the director, 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 deemed appropriate and feasible by the director 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

(10) This protocol shall 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 utilization 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.

§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 federal environmental protection agency unilateral enforcement order, under §104 through §106 of the "Comprehensive Environmental Response, Compensation and Liability Act", 94 Stat. 2779, 42 U.S.C. §9601, as amended, or have been listed or proposed to be listed by the United States environmental protection agency on the priorities list of Title I of said act, or subject to a unilateral enforcement order under §3008 and §7003 of the "Resource Conservation Recovery Act" or any unilateral en-
forcement order for corrective action under this chapter:

Provided, That the release which is subject to remediation was not created through gross negligence or willful mis-

conduct. In order to participate in the voluntary remediation program, a person must submit an application to the director and enter into a voluntary remediation agreement as set forth in section seven of this article.

(b) Any person who desires to participate in the vol-
utary remediation program must submit to the division an application and an application fee established by the director. The application shall be on a form provided by the director 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 made by a licensed remediation specialist and all other information required by the director.

(c) The director 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 section six of this article.

(d) Information obtained by the division under this article shall be available to the public, unless the director certifies such information to be confidential. The director may make such certification where any person shows, to the satisfaction of the director, 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 five thousand dollars 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 immediately contiguous to the site, or wherever the contamination came to be located.

(f) The director 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 director shall act upon all applications within forty-five days of receipt, unless an extension of time is mutually agreed to and confirmed in writing. If an application is returned by the director because it is not complete or accurate, the director 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 director 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 twenty-five days of rejection, indicate his desire to resubmit the application. Upon final determination by the director, if the application is rejected, the director shall return one half of the application fee. The applicant may appeal the director's rejection of the application to the environmental quality board established under article three, chapter twenty-two-b of this code.

(i) Upon withdrawal of an application, the applicant is entitled to the refund of one half of the application fee.
§22-22-5. Brownfield application; remediation process; brownfield remediation; eligibility; application; remediation loan; and obtaining information from director.

(a) For brownfield property, any environmental remediation undertaken pursuant to this article, by a development authority or any person who did not cause or contribute to the contamination on the property shall comply with the appropriate standards established by the director pursuant to this article and rules promulgated hereunder. After conferring with the director, the person may apply to the director for a site assessment loan under section six of this article. A site assessment must be conducted to establish existing contamination of the site. An application for brownfield remediation must be submitted along with the application fee. The procedures established for voluntary remediation set forth in section four must be followed. The director shall establish a reasonable application fee.

(b) Brownfield sites being remediated by persons who did not cause or contribute to the contamination of the site are eligible for consideration for remediation loans established under article fifteen, chapter thirty-one of this code.

(c) Persons undertaking brownfield remediation, who did not cause or contribute to the contamination of the brownfield site, may obtain all information relating to contamination at the site in the possession of the director prior to engaging in a site assessment.

§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 created in the state treasury a 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 director 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 director for the administration, licensing, enforcement, inspection, monitoring, planning, research and other activities required by this article.

The director shall promulgate legislative rules in accordance with the provisions of chapter twenty-nine-a 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 created 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 solely to make loans to persons to finance site assessments 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 division in administering the provisions of this subsection. The director shall promulgate rules in accordance with the provisions of chapter twenty-nine-a 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 such loans: Provided, however, That amounts in the fund, other than those appropriated by the federal government, 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.

In order to carry out the administration and management of the fund, the division is authorized to 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, to determine their duties and compensation without the approval of any other agency or instrumentality.

§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 director 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 must 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 director shall provide for the services of a licensed remediation specialist for supervision of all activities described in the agreement;

(c) A voluntary remediation agreement must provide for cost recovery of all reasonable costs incurred by the division 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 director, 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) No voluntary remediation agreement may 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 director 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 director
and the applicant shall develop a remediation agreement.
If an agreement is not reached between the applicant and
the director on or before the thirty-first day after the
application has been accepted, either party may withdraw
from negotiations. Should this occur, the agency retains
the application fee. The applicant may appeal the failure
to reach agreement to the environmental quality board as
established under article three, chapter twenty-two-b of
this code. By mutual agreement, when it becomes
impractical to reach an agreement within thirty-one days,
the time limit may be extended in writing; and

(f) The division 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.

§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 director. The director shall review and evaluate the work plans and reports for accuracy, quality and completeness. The director may approve a voluntary remediation work plan or report or disapprove and notify the person of additional information needed to obtain approval.

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

The person undertaking remediation may, in their sole discretion, terminate the agreement as provided by the terms of the agreement and by giving fifteen days advance written notice of termination. Only those costs incurred or obligated by the director 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 director may have under any other law to recover costs. The person undertaking the remediation must pay the division's costs associated with the voluntary remediation within thirty-one days after receiving notice that the costs are due and owing. The director 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 division and reasonable legal expenses.

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

(a) The director, 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 director.
(b) The director shall make periodic inspections at sites subject to this article. After an inspection is made, a report shall be filed with the director 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 subsection (d), section four of this article. The inspection reports shall be available to the public in accordance with the provisions of article one, chapter twenty-nine-b of this code.

(c) The director 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 director may utilize such sampling methods as are necessary in exercising good scientific technique. Following the taking of any sample, the director 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 director 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 director shall be given access to all records relating to a brownfield or voluntary remediation.


(a) No person may practice as a licensed remediation specialist without a license issued by the director. Any violation of this provision shall be subject to the enforcement orders as set forth in section twelve of this article.

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

The director shall establish the date, time and location of licensed remediation specialist examinations.

The applicant must 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.

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

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 division, if there is a threat to the environment or the health, safety or welfare of the public.
A licensed remediation specialist shall only perform assignments for which the specialist 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 director; or knowingly associate with one who is engaging in business or professional practices of a fraudulent or dishonest nature.

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

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

The director is authorized to 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.

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

If the director, 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 director may:

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 director within seven days of the receipt of the order. The director shall conduct a hearing on the merits of the order within ten 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, he or she shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than fifty thousand dollars or imprisoned not less than one nor more than two years, or both such fine and imprisonment.

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


(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 director.

(b) The director 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.

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

(a) The director shall establish by rule, criteria for deed recordation of land-use covenants and containing all necessary deed restrictions. The director 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 director 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 twenty-five thousand dollars, imprisoned for not more than five years, or both.


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 director 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 division 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.

§22-22-16. Duty of assessor and citizens to notify director 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 director 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 director in writing. The director shall then investigate and proceed with any necessary enforcement action.

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

Persons undertaking the remediation and revitalization of brownfield sites shall comply with the following public notice and review requirements:

(a) A notice of intent to remediate a site shall be submitted to the division which provides, 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 division shall publish an acknowledgment noting the receipt of the notice of intent in a division publication of general circulation. At the time a notice of intent to remediate a site is submitted to the division, a copy of such notice shall be provided to the municipality and the county in which the site is located and 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.

(b) The notice required by this subsection shall include a thirty-day public, county and municipal comment period during which the public, county and municipality can 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 director, the person undertaking the remediation shall develop and implement a public involvement program plan which meets the requirements set forth by the director.


(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 division shall not be
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 section two, article
one, chapter twenty-four 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.

§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.


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 division;

(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.


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.

CHAPTER 31. CORPORATIONS.

ARTICLE 15. ECONOMIC DEVELOPMENT AUTHORITY.


Unless the context clearly indicates otherwise, as used in this article:

(a) "Authority" means the West Virginia economic development authority;

(b) "Board" means the governing body of the authority;

(c) "Board of investments" means the board of investments established by article six, chapter twelve of this code;

(d) "Bonds" means bonds or other debt instruments of
(e) "Business plan" means a document detailing the sales, production and distribution plans of an enterprise, together with the expenditures necessary to carry out those plans (including budget and cash flow projections) on an annual basis, and an employment plan setting forth steps to be taken by the enterprise to retain jobs or reduce unemployment in this state;

(f) "Costs of establishing an industrial development project" means the cost of acquiring existing facilities, cost of machinery, cost of equipment and fixtures, the cost of construction, including with out limitation, cost of improvements, repairs, and renovations, costs of all lands, water areas, property rights and easements, financing charges, interest prior to and during construction, cost of architectural, engineering, legal and financial or other consulting services, plans, site assessments, site remediation costs, specifications and surveys, estimates of costs and any other expenses necessary or incident to determining the feasibility or practicability of any project, together with such other costs and expenses as may be necessary or incidental to the financing and the construction or acquisition of the project and the placing of the same in operation;

(g) "County" means any county of this state;

(h) "Enterprise" means an entity which is or proposes to be engaged in this state in any business activity for profit. The entity may be owned, operated, controlled or under the management of a person, partnership, corporation, trust, community-based development organization or council, local commerce group, employee stock ownership plan, pension or profit-sharing plan, a group of participating employees who desire to own an entity which does not presently exist, or any similar entity or organization;

(i) "Federal agency" means the United States of America and any department, corporation, agency or
instrumentality created, designated or established by the United States of America;

(j) "Financing plan" means a plan designed to meet the financing needs of an enterprise as reflected in the business plan;

(k) "Fund" means the economic development fund provided for in section twenty-three of this article;

(l) "Government" means state and federal government, and any political subdivision, agency or instrumentality thereof, corporate or otherwise;

(m) "Industrial development agency" means any incorporated organization, foundation, association or agency to whose members or shareholders no profit inures, which has as its primary function the promotion, encouragement and development of industrial, commercial, manufacturing and tourist enterprises or projects in this state;

(n) "Insurance fund" means the insurance fund created in this article;

(o) "Loan" means an extension of financing by the authority to an industrial development agency or an enterprise, including, but not limited to a loan, a lease or an installment sale;

(p) "Municipality" means any city or town in this state;

(q) "Notes" means any notes, including commercial paper, of the authority issued under this article whether the interest thereon is taxable or tax-exempt for federal income tax purposes;

(r) "Project" means a commercial or industrial undertaking and all of the assets reasonably and necessarily required therefor, all as determined by the authority, which determination shall be conclusive, and shall include, without limiting the generality of the foregoing, industrial projects and commercial projects as presently defined in section three, article two-c, chapter thirteen;
(s) "Revenues" means all fees, premiums, charges, moneys, profits, payment or principal of or interest on, loans and other investments, gifts, grants, appropriations, contributions and all other income derived or to be derived by the authority under this article; and

(t) "Security interest" means an interest in the loan portfolio of the authority which interest is secured by an underlying loan or loans and is evidenced by a note issued by the authority.
The Joint Committee, on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

Takes effect July 1, 1996.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 25th day of March, 1996.

Governor