WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1998

ENROLLED
Committee Substitute for
SENATE BILL NO. 145

(By Senator Anderson, et al.)

PASSED March 14, 1998
In Effect 90 Days From Passage
ENROLLED

COMMITTEE SUBSTITUTE
FOR

Senate Bill No. 145

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

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

AN ACT to amend and reenact section six, article one, chapter twenty-two of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend article eleven of said chapter by adding thereto a new section, designated section seven-a, all relating generally to establishing a water quality certification program for surface mining operations; authorizing the director to enter into certification agreements; providing for certificating upon receipt of certain federal permits; requiring compliance with current environmental laws; providing circumstances when a certification is required; establishing mitigation ratios and
fees for loss of waters of this state; requiring certain activities as part of certification requirements; establishing requirements and review of mitigation by the director; establishing application processing requirements for the director; providing for public participation of application approval process; providing that the legislative auditor conduct a performance review of the mitigation program; requiring the director to conduct a study and enter into certain agreements; and authorizing the joint committee on government and finance to conduct a study and establishing guidelines for the study.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 1. DIVISION OF ENVIRONMENTAL PROTECTION.

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

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

(b) The director has the power to and may designate supervisory officers or other officers or employees of the division to substitute for him or her on any board or commission established under this code or to sit in his or
her place in any hearings, appeals, meetings or other activities with such substitute having the same powers, duties, authority and responsibility as the director. Additionally, the director has the power to delegate, as he or she considers appropriate, to supervisory officers or other officers or employees of the division his or her powers, duties, authority and responsibility relating to issuing permits, hiring and training inspectors and other employees of the division, conducting hearings and appeals and such other duties and functions set forth in this chapter or elsewhere in this code.

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

(1) That the division carries out its functions in a manner which supplements and complements the environmental policies, programs and procedures of the federal government, other state governments and other instrumentalities of this state; and (2) that appropriate officers and employees of the division consult with individuals responsible for making policy relating to environmental issues in the federal government, other state governments and other instrumentalities of this state concerning differences over environmental policies, programs and procedures and concerning the impact of statutory law and rules upon the environment of this state.

(d) In addition to other powers, duties and responsibilities granted and assigned to the director by this chapter, the director is hereby authorized and empowered to:

(1) Sign and execute in the name of the state by the "division of environmental protection" any contract or agreement with the federal government or its departments or agencies, subdivisions of the state, corporations, associations, partnerships or individuals: Provided, That the powers granted to the director to enter into agreements or contracts and to make expenditures and obliga-
tions of public funds under this subdivision may not exceed or be interpreted as authority to exceed the powers heretofore granted by the Legislature to the various commissioners, directors or board members of the various departments, agencies or boards that comprise and are incorporated into each secretary's department pursuant to the provisions of chapter five-f of this code;

(2) Conduct research in improved environmental protection methods and disseminate information to the citizens of this state;

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

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

(5) Provide for workshops, training programs and other educational programs, apart from or in cooperation with other governmental agencies, necessary to ensure adequate standards of public service in the division. The director may also provide for technical training and specialized instruction of any employee. Approved educational programs, training and instruction time may be compensated for as a part of regular employment. The director is further authorized to pay out of federal or state funds, or both, as such funds are available, fees and expenses incidental to such educational programs, train-
ing and instruction. Eligibility for participation by employees will be in accordance with guidelines established by the director;

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

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

(e) The director shall be appointed by the governor, by and with the advice and consent of the Senate, and serves at the will and pleasure of the governor: Provided, That in lieu of appointing a director, the governor may order the secretary to directly exercise the powers of the director. The secretary shall designate the order in which other officials of the division shall act for and perform the functions of the secretary or the director during the absence or disability of both the secretary and the director or in the event of vacancies in both of those offices.

(f) At the time of his or her initial appointment, the director shall be at least thirty years old and shall be selected with special reference and consideration given to his or her administrative experience and ability, to his or her demonstrated interest in the effective and responsible
regulation of the energy industry and the conservation and
wise use of natural resources. The director shall have at
least a bachelor's degree in a related field and shall have
at least three years of experience in a position of responsi-
ble charge in at least one discipline relating to the duties
and responsibilities for which the director will be respon-
sible upon assumption of the office of director. The
director may not be a candidate for or hold any other
public office, may not be a member of any political party
committee and shall immediately forfeit and vacate his or
her office as director in the event he or she becomes a
candidate for or accepts appointment to any other public
office or political party committee.

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

ARTICLE 11. WATER POLLUTION CONTROL ACT.
§22-11-7a. Certification agreements; required provisions;
effective date.

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

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

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

(B) Heavy equipment, such as bulldozers, backhoes and draglines, may not be used or operated within waters of the state outside of the boundaries of a permanent structure, unless that use cannot be avoided. If use of heavy equipment within waters of the state outside the boundaries of a permanent structure is unavoidable, then the work shall be performed so as to minimize resuspension of sediments and disturbance to substrates, banks or riparian vegetation;

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

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

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

(A) The water quality certification may require mitigation at a ratio two acres for every one acre of permanent loss of waters of the state on the permitted area, except for waters of the state isolated as a result of the permanent structure;

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

(C) The director may accept mitigation on the permitted area, mitigation off the permitted area, mitigation banking of waters of the state, or any combination thereof, or any other mitigation measure acceptable to the director;
(D) Upon completion of the work required by an agreement to conduct operations authorized by this subsection, the surface coal mining operation shall obtain a certification from a registered professional engineer that all mitigation work specified in the agreement has been completed in accordance with the conditions of the water quality certification. The director shall promptly review the certification and provide to the surface coal mining operation with notice that all mitigation work has been successfully completed, or that further mitigation work is necessary to meet the conditions imposed by the water quality certification. The mitigation amount may not exceed two hundred twenty-five thousand dollars per acre of stream disturbed. Those moneys shall be deposited in the stream restoration fund under the jurisdiction of the division of environmental protection and any expenditures from this fund after the thirtieth day of June, one thousand ninety-eight, shall not be authorized from collections but shall only be authorized by appropriation by the Legislature.

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

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

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

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

(8) The proposed surface coal mining operation shall
comply with all state and federal laws, rules and regula-
tions. The director shall review each mitigation agree-
ment signed on or after the ninth day of March, one thousand nine hundred ninety-six, to ensure compliance with all the provisions of this section.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within approved this the 8th day of April, 1998.

Governor