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STATE OF WEST VIRGINIA

# WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 2003



# ENROLLED

## House Bill No. 2882

(By Delegates Craig, Morgan, Caputo and Smirl)



Passed March 8, 2003

In Effect Ninety Days from Passage

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OFFICE OF THE CLERK  
LEGISLATIVE SERVICES

## ENROLLED

# H. B. 2882

(BY DELEGATES CRAIG, MORGAN, CAPUTO AND SMIRL)

[Passed March 8, 2003; in effect ninety days from passage.]

AN ACT to amend and reenact section seven, article one, chapter twenty-two-b of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to appeals to the environmental quality boards generally; and limiting requirements for stays for appeals under the surface coal mining and reclamation act for unjust hardship.

*Be it enacted by the Legislature of West Virginia:*

That section seven, article one, chapter twenty-two-b of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

### ARTICLE 1. GENERAL POLICY AND PURPOSE.

#### §22B-1-7. Appeals to boards.

- 1 (a) The provisions of this section are applicable to all
- 2 appeals to the boards, with the modifications or exceptions set
- 3 forth in this section.

4 (b) Any person authorized by statute to seek review of an  
5 order, permit or official action of the chief of air quality, the  
6 chief of water resources, the chief of waste management, the  
7 chief of mining and reclamation, the chief of oil and gas, or the  
8 secretary may appeal to the air quality board, the environmental  
9 quality board or the surface mine board, as appropriate, in  
10 accordance with this section. The person so appealing shall be  
11 known as the appellant and the appropriate chief or the secre-  
12 tary shall be known as the appellee.

13 (c) An appeal filed with a board by a person subject to an  
14 order, permit or official action shall be perfected by filing a  
15 notice of appeal with the board within thirty days after the date  
16 upon which such order, permit or official action was received  
17 by such person as demonstrated by the date of receipt of  
18 registered or certified mail or of personal service. For parties  
19 entitled to appeal other than the person subject to such order,  
20 permit or official action, an appeal shall be perfected by filing  
21 a notice of appeal with the board within thirty days after the  
22 date upon which service was complete. For purposes of this  
23 subsection, service is complete upon tendering a copy to the  
24 designated agent or to the individual who, based upon reason-  
25 able inquiry, appears to be in charge of the facility or activity  
26 involved, or to the permittee; or by tendering a copy by  
27 registered or certified mail, return receipt requested to the last  
28 known address of the person on record with the agency. Service  
29 is not incomplete by refusal to accept. Notice of appeal must be  
30 filed in a form prescribed by the rule of the board for such  
31 purpose. Persons entitled to appeal may also file a notice of  
32 appeal related to the failure or refusal of the appropriate chief  
33 or the secretary to act within a specified time on an application  
34 for a permit; such notice of appeal shall be filed within a  
35 reasonable time.

36 (d) The filing of the notice of appeal does not stay or  
37 suspend the effectiveness or execution of the order, permit or

38 official action appealed from, except that the filing of a notice  
39 of appeal regarding a notice of intent to suspend, modify or  
40 revoke and reissue a permit, issued pursuant to the provisions  
41 of section five, article five, chapter twenty-two of this code,  
42 does stay the notice of intent from the date of issuance pending  
43 a final decision of the board. If it appears to the appropriate  
44 chief, the secretary or the board that an unjust hardship to the  
45 appellant will result from the execution or implementation of a  
46 chief's or secretary's order, permit or official action pending  
47 determination of the appeal, the appropriate chief, the secretary  
48 or the board, as the case may be, may grant a stay or suspension  
49 of the order, permit or official action and fix its terms: *Pro-*  
50 *vided*, That unjust hardship shall not be grounds for granting a  
51 stay or suspension of an order, permit or official action for an  
52 order issued pursuant to article three, chapter twenty-two of this  
53 code. A decision shall be made on any request for a stay within  
54 five days of the date of receipt of the request for stay. The  
55 notice of appeal shall set forth the terms and conditions of the  
56 order, permit or official action complained of and the grounds  
57 upon which the appeal is based. A copy of the notice of appeal  
58 shall be filed by the board with the appropriate chief or secre-  
59 tary within seven days after the notice of appeal is filed with the  
60 board.

61 (e) Within fourteen days after receipt of a copy of the notice  
62 of appeal, the appropriate chief or the secretary as the case may  
63 be, shall prepare and certify to the board a complete record of  
64 the proceedings out of which the appeal arises including all  
65 documents and correspondence in the applicable files relating  
66 to the matter in question. With the consent of the board and  
67 upon such terms and conditions as the board may prescribe, any  
68 person affected by the matter pending before the board may by  
69 petition intervene as a party appellant or appellee. In any appeal  
70 brought by a third party, the permittee or regulated entity shall  
71 be granted intervenor status as a matter of right where issuance  
72 of a permit or permit status is the subject of the appeal. The

73 board shall hear the appeal de novo, and evidence may be  
74 offered on behalf of the appellant, appellee and by any  
75 intervenors. The board may visit the site of the activity or  
76 proposed activity which is the subject of the hearing and take  
77 such additional evidence as it considers necessary: *Provided*,  
78 That all parties and intervenors are given notice of the visit and  
79 are given an opportunity to accompany the board. The appeal  
80 hearing shall be held at such location as may be approved by  
81 the board including Kanawha County, the county wherein the  
82 source, activity or facility involved is located or such other  
83 location as may be agreed to among the parties.

84 (f) Any such hearing shall be held within thirty days after  
85 the date upon which the board received the timely notice of  
86 appeal, unless there is a postponement or continuance. The  
87 board may postpone or continue any hearing upon its own  
88 motion, or upon application of the appellant, the appellee or any  
89 intervenors for good cause shown. The chief or the secretary, as  
90 appropriate, may be represented by counsel. If so represented  
91 they shall be represented by the attorney general or with the  
92 prior written approval of the attorney general may employ  
93 counsel who shall be a special assistant attorney general. At any  
94 such hearing the appellant and any intervenor may represent  
95 themselves or be represented by an attorney-at-law admitted to  
96 practice before the supreme court of appeals.

97 (g) After such hearing and consideration of all the testi-  
98 mony, evidence and record in the case:

99 (1) The environmental quality board or the air quality  
100 board, as the case may be, shall make and enter a written order  
101 affirming, modifying or vacating the order, permit or official  
102 action of the chief or secretary, or shall make and enter such  
103 order as the chief or secretary should have entered, or shall  
104 make and enter an order approving or modifying the terms and  
105 conditions of any permit issued; and

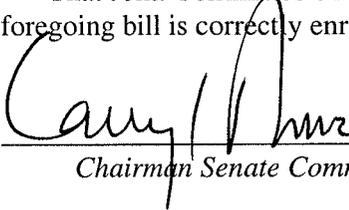
106       (2) The surface mine board shall make and enter a written  
107 order affirming the decision appealed from if the board finds  
108 that the decision was lawful and reasonable, or if the board  
109 finds that the decision was not supported by substantial  
110 evidence in the record considered as a whole, it shall make and  
111 enter a written order reversing or modifying the decision of the  
112 secretary.

113       (h) In appeals of an order, permit or official action taken  
114 pursuant to articles, six, eleven, twelve, thirteen, fifteen, chapter  
115 twenty-two of this code, the environmental quality board  
116 established in article three of this chapter, shall take into  
117 consideration, in determining its course of action in accordance  
118 with subsection (g) of this section, not only the factors which  
119 the appropriate chief or the secretary was authorized to consider  
120 in issuing an order, in granting or denying a permit, in fixing  
121 the terms and conditions of any permit, or in taking other  
122 official action, but also the economic feasibility of treating or  
123 controlling, or both, the discharge of solid waste, sewage,  
124 industrial wastes or other wastes involved.

125       (i) An order of a board shall be accompanied by findings of  
126 fact and conclusions of law as specified in section three, article  
127 five, chapter twenty-nine-a of this code, and a copy of such  
128 order and accompanying findings and conclusions shall be  
129 served upon the appellant, and any intervenors, and their  
130 attorneys of record, if any, and upon the appellee in person or  
131 by registered or certified mail.

132       (j) The board shall also cause a notice to be served with the  
133 copy of such order, which notice shall advise the appellant, the  
134 appellee and any intervenors of their right to judicial review, in  
135 accordance with the provisions of this chapter. The order of the  
136 board shall be final unless vacated or modified upon judicial  
137 review thereof in accordance with the provisions of this chapter.

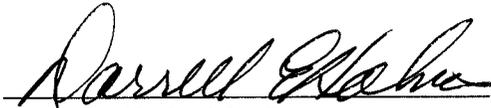
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

  
\_\_\_\_\_  
Chairman Senate Committee

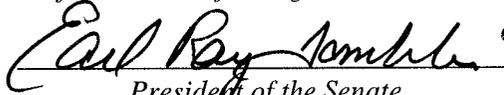
  
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Chairman House Committee

Originating in the House.

In effect ninety days from passage

  
\_\_\_\_\_  
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 15<sup>th</sup>  
day of April, 2003.

  
\_\_\_\_\_  
Governor

PRESENTED TO THE  
GOVERNOR

Date 3/26/03

Time 3:50 pm