

S HB 2333

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WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 2004



ENROLLED

House Bill No. 2333

(By R. Thompson, Brown, Delong, Hruthay,
Mahan, Pino and Ellem)



Passed March 24, 2005

In Effect Ninety Days from Passage

E N R O L L E D

H. B. 2333

(BY R. THOMPSON, BROWN, DELONG, HRUTHAY,
MAHAN, PINO AND ELLEM)

[Passed March 24, 2005; in effect ninety days from passage.]

AN ACT to amend the code of West Virginia, 1931, as amended, by adding thereto a new article, designated §22-27-1, §22-27-2, §22-27-3, §22-27-4, §22-27-5, §22-27-6, §22-27-7, §22-27-8, §22-27-9, §22-27-10, §22-27-11, and §22-27-12, all relating to establishing a program to encourage voluntary reclamation of lands adversely affected by mining by limiting the liability which could arise as a result of the voluntary reclamation of abandoned lands or reduction and abatement of water pollution; stating legislative purpose and intent; setting forth legislative findings; providing definitions for applicable terms; defining eligibility for the protections and immunities; setting forth specific exemptions from liability for landowners; setting forth specific exemptions from liability for persons who provide equipment at no cost or at cost for a reclamation project; and providing exceptions to coverage under the proposed legislation.

Be it enacted by the Legislature of West Virginia:

That the code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §22-27-1, §22-27-2, §22-

27-3, §22-27-4, §22-27-5, §22-27-6, §22-27-7, §22-27-8, §22-27-9, §22-27-10, §22-27-11 and §22-27-12, all to read as follows:

ARTICLE 27. ENVIRONMENTAL GOOD SAMARITAN ACT.

§22-27-1. Declaration of policy and purpose.

1 This article is intended to encourage the improvement of
2 land and water adversely affected by mining, to aid in the
3 protection of wildlife, to decrease soil erosion, to aid in the
4 prevention and abatement of the pollution of rivers and streams,
5 to protect and improve the environmental values of the citizens
6 of this state and to eliminate or abate hazards to health and
7 safety. It is the intent of the Legislature to encourage voluntary
8 reclamation of lands adversely affected by mining. The purpose
9 of this article is to improve water quality and to control and
10 eliminate water pollution resulting from mining extraction or
11 exploration by limiting the liability which could arise as a result
12 of the voluntary reclamation of abandoned lands or the reduc-
13 tion and abatement of water pollution. This article is not
14 intended to limit the liability of a person who by law is or may
15 become responsible to reclaim the land or address the water
16 pollution or anyone who by contract, order or otherwise is
17 required to or agrees to perform the reclamation or abate the
18 water pollution.

§22-27-2. Legislative findings.

1 The Legislature finds and declares as follows:

2 (1) The state's long history of mining has left some lands
3 and waters unreclaimed and polluted.

4 (2) These abandoned lands and polluted waters are unpro-
5 ductive, diminish the tax base and are serious impediments to
6 the economic welfare and growth of this state.

7 (3) The unreclaimed lands and polluted waters present a
8 danger to the health, safety and welfare of the people and the
9 environment.

10 (4) The state of West Virginia does not possess sufficient
11 resources to reclaim all the abandoned lands and to abate the
12 water pollution.

13 (5) Numerous landowners, citizens, watershed associations,
14 environmental organizations and governmental entities who do
15 not have a legal responsibility to reclaim the abandoned lands
16 or to abate the water pollution are interested in addressing these
17 problems but are reluctant to engage in such reclamation and
18 abatement activities because of potential liabilities associated
19 with the reclamation and abatement activities.

20 (6) It is in the best interest of the health, safety and welfare
21 of the people of this state and the environment to encourage
22 reclamation of the abandoned lands and abatement of water
23 pollution.

24 (7) That this act will encourage and promote the reclama-
25 tion of these properties.

§22-27-3. Definitions.

1 As used in this article unless used in a context that clearly
2 requires a different meaning, the term:

3 (a) "Abandoned lands" means land adversely affected by
4 mineral extraction and left or abandoned in an unreclaimed or
5 inadequately reclaimed condition.

6 (b) "Consideration" means something of value promised,
7 given or performed in exchange for something which has the
8 effect of making a legally enforceable contract. For the purpose
9 of this article, the term does not include a promise to a land-

10 owner to repair damage caused by a reclamation project or
11 water pollution abatement project when the promise is made in
12 exchange for access to the land.

13 (c) "Department" means the West Virginia department of
14 environmental protection.

15 (d) "Eligible land" means land adversely affected by
16 mineral extraction and left or abandoned in an unreclaimed or
17 inadequately reclaimed condition or causing water pollution
18 and for which no person has a continuing reclamation or water
19 pollution abatement obligation.

20 (e) "Eligible landowner" means a landowner that provides
21 access to or use of the project work area at no cost for a
22 reclamation or water pollution abatement project who is not or
23 will not become responsible under state or federal law to
24 reclaim the land or address the water pollution existing or
25 emanating from the land.

26 (f) "Eligible project sponsor" means a person that provides
27 equipment, materials or services at no cost or at cost for a
28 reclamation or water pollution abatement project who is not or
29 will not become responsible under state or federal law to
30 reclaim the land or address the water pollution existing or
31 emanating from the land.

32 (g) "Landowner" means a person who holds either legal or
33 equitable interest in real property.

34 (h) "Mineral" means any aggregate or mass of mineral
35 matter, whether or not coherent, which is extracted by mining.
36 This includes, but is not limited to, limestone, dolomite, sand,
37 gravel, slate, argillite, diabase, gneiss, micaceous sandstone
38 known as bluestone, rock, stone, earth, fill, slag, iron ore, zinc
39 ore, vermiculite, clay and anthracite and bituminous coal.

40 (i) "Permitted activity site" means a site permitted by the
41 department of environmental protection under the provisions of
42 article two, three or four of this chapter.

43 (j) "Person" means a natural person, partnership, associa-
44 tion, association members, corporation, an agency, instrumen-
45 tality or entity of federal or state government or other legal
46 entity recognized by law as the subject of rights and liabilities.

47 (k) "Project work area" means that land necessary for a
48 person to complete a reclamation project or a water pollution
49 abatement project.

50 (l) "Reclamation project" means the restoration of eligible
51 land to productive use by regrading and revegetating the land to
52 stable contours that blend in and complement the drainage
53 pattern of the surrounding terrain with no highwalls, spoil piles
54 or depressions to accumulate water, or to decrease or eliminate
55 discharge of water pollution.

56 (m) "Water pollution" means the man-made or man-
57 induced alteration of the chemical, physical, biological and
58 radiological integrity of water located in the state.

59 (n) "Water pollution abatement facilities" means the
60 methods for treatment or abatement of water pollution located
61 on eligible lands. These methods include, but are not limited to,
62 a structure, system, practice, technique or method constructed,
63 installed or followed to reduce, treat or abate water pollution.

64 (o) "Water pollution abatement project" means a plan for
65 treatment or abatement of water pollution located on eligible
66 lands.

§22-27-4. Eligibility and project inventory.

1 (a) *General rule.* — An eligible landowner or eligible
2 project sponsor who voluntarily provides equipment, materials

3 or services at no charge or at cost for a reclamation project or
4 a water pollution abatement project in accordance with the
5 provisions of this article is immune from civil liability and may
6 raise the protections afforded by the provisions of this article in
7 any subsequent legal proceeding which is brought to enforce
8 environmental laws or otherwise impose liability. An eligible
9 landowner or eligible project sponsor is only entitled to the
10 protections and immunities provided by this article after
11 meeting all eligibility requirements and compliance with a
12 detailed written plan of the proposed reclamation project or
13 water pollution abatement project which is submitted to and
14 approved by the department. The project plan shall include the
15 objective of the project and a description of the work to be
16 performed to accomplish the objective and shall, additionally,
17 identify the project location, project boundaries, project
18 participants and all landowners.

19 (b) *Notice.* — The department shall give written notice by
20 certified mail to adjacent property owners and riparian land
21 owners located downstream of the proposed project, provide
22 Class IV public notice of the proposed project in a newspaper
23 of general circulation, published in the locality of the proposed
24 project, and shall give public notice in the state register. The
25 project sponsor may also provide public notice. Any person
26 having an interest which may be adversely affected by the
27 proposed project has the right to file written objections to the
28 department within thirty days after receipt of the written notice
29 or within thirty days after the last publication of the Class IV
30 notice. The department shall provide to the project sponsor a
31 copy of each written objection received during the public
32 comment period, which shall conclude at the expiration of the
33 applicable thirty-day period provided for in this section.

34 (c) *Advice.* — The department may provide advice to the
35 landowner or to other interested persons based upon the

36 department's knowledge and experience in performing reclama-
37 tion projects and water pollution abatement projects.

38 (d) *Departmental review.* — The department shall review
39 each proposed reclamation project and approve the project if
40 the department determines the proposed project:

41 (1) Will result in the appropriate reclamation and regrading
42 of the land according to all applicable laws and regulations;

43 (2) Will result in the appropriate revegetation of the site;

44 (3) Is not likely to result in pollution as defined in article
45 eleven of this chapter; and

46 (4) Is likely to improve the water quality and is not likely
47 to make the water pollution worse.

48 (e) *Project inventory.* — The department shall develop and
49 maintain a system to inventory and record each project, the
50 project location and boundaries, each landowner and each
51 person identified in a project plan provided to the department.
52 The inventory shall include the results of the department's
53 review of the proposed project and, where applicable, include
54 the department's findings under subsection (b), section ten of
55 this article.

56 (f) *Appeal.* — A person aggrieved by a department decision
57 to approve or disapprove a reclamation project or a water
58 pollution abatement project has the right to file an appeal with
59 the environmental quality board under the provisions of article
60 one, chapter twenty-two-b of this code.

§22-27-5. Landowner liability limitation and exceptions.

1 (a) *General rule.* — Except as specifically provided in
2 subsections (b) and (c) of this section, an eligible landowner

3 who provides access to the land, without charge or other
4 consideration, which results in the implementation of a reclama-
5 tion project or a water pollution abatement project:

6 (1) Is immune from liability for any injury or damage
7 suffered by persons working under the direct supervision of the
8 project sponsor while such persons are within the project work
9 area;

10 (2) Is immune from liability for any injury to or damage
11 suffered by a third party which arises out of or occurs as a result
12 of an act or omission of the project sponsor which occurs
13 during the implementation of the reclamation project or the
14 water pollution abatement project;

15 (3) Is immune from liability for any injury to or damage
16 suffered by a third party which arises out of or occurs as a result
17 of a reclamation project or a water pollution abatement project;

18 (4) Is immune from liability for any pollution resulting
19 from a reclamation project or water pollution abatement
20 project;

21 (5) Is immune from liability for the operation, maintenance
22 or repair of the water pollution abatement facilities constructed
23 or installed during the project unless the eligible landowner
24 negligently damages or destroys the water pollution abatement
25 facilities or denies access to the project sponsor who is respon-
26 sible for the operation, maintenance or repair the water pollu-
27 tion abatement facilities.

28 (b) *Duty to warn.* — The eligible landowner shall warn the
29 project sponsor of known, latent, dangerous conditions located
30 on the project work area which are not the subject of the
31 reclamation project or the water pollution abatement project.
32 Nothing in this article shall limit an eligible landowner's

33 liability which results from the eligible landowner's failure to
34 warn of such known, latent, dangerous conditions.

35 (c) *Exceptions to immunity.* — Nothing in this article may
36 limit an eligible landowner's liability which results from a
37 reclamation project or water pollution abatement project and
38 which would otherwise exist:

39 (1) For injury or damage resulting from the landowner's
40 acts or omissions which are reckless or constitute gross
41 negligence or willful misconduct.

42 (2) Where the landowner accepts or requires consideration
43 for allowing access to the land for the purpose of implementing
44 a reclamation project or water pollution abatement project or to
45 operate, maintain or repair water pollution abatement facilities
46 constructed or installed during a water pollution abatement
47 project.

48 (3) For the landowner's unlawful activities.

49 (4) For damage to adjacent landowners or downstream
50 riparian landowners which results from a reclamation project or
51 water pollution abatement project where written notice or
52 public notice of the proposed project was not provided.

§22-27-6. Project sponsor liability limitation and exceptions.

1 (a) *General rule.* — Except as specifically provided in
2 subsection (b) of this section, a project sponsor who provides
3 equipment, materials or services at no cost or at cost for a
4 reclamation project or a water pollution abatement project:

5 (1) Is immune from liability for any injury to or damage
6 suffered by a person which arises out of or occurs as a result of
7 the water pollution abatement facilities constructed or installed
8 during the water pollution abatement project;

9 (2) Is immune from liability for any pollution emanating
10 from the water pollution abatement facilities constructed or
11 installed during the water pollution abatement project unless the
12 person affects an area that is hydrologically connected to the
13 water pollution abatement project work area and causes
14 increased pollution by activities which are unrelated to the
15 implementation of a water pollution abatement project, Pro-
16 vided that the project sponsor implements, operates, and
17 maintains the project in accordance with the plans approved by
18 the department;

19 (3) Is immune from liability for the operation, maintenance
20 and repair of the water pollution abatement facilities con-
21 structed or installed during the water pollution abatement
22 project.

23 (b) *Exceptions.* —

24 (1) Nothing in this article shall limit in any way the liability
25 of a project sponsor which liability results from the reclamation
26 project or the water pollution abatement project and which
27 would otherwise exist:

28 (A) For injury or damage resulting from the project spon-
29 sor's acts or omissions which are reckless or constitute gross
30 negligence or willful misconduct.

31 (B) For the person's unlawful activities.

32 (C) For damages to adjacent landowners or downstream
33 riparian landowners which result from a reclamation project or
34 a water pollution abatement project where written notice or
35 public notice of the proposed project was not provided.

36 (2) Nothing in this article shall limit in any way the liability
37 of a person who the department has found to be in violation of
38 any other provision or provisions of this chapter.

§22-27-7. Permits and zoning.

1 Nothing in this article may be construed as waiving any
2 existing permit requirements or waiving any local zoning
3 requirements.

§22-27-8. Relationship to federal and state programs.

1 The provisions of this article shall not prevent the depart-
2 ment from enforcing requirements necessary or imposed by the
3 federal government as a condition to receiving or maintaining
4 program authorization, delegation, primacy or federal funds.

§22-27-9. General permits.

1 If the department determines it will further the purposes of
2 this article, the department may issue a general permit for each
3 reclamation project or water pollution abatement project, which
4 shall:

5 (1) Encompass all of the activities included in the reclama-
6 tion project or water pollution abatement project.

7 (2) Be issued in place of any individual required stream
8 encroachment, earth disturbance or national pollution discharge
9 elimination system permits.

§22-27-10. Exceptions.

1 (a) *General rule.* — Any person who under existing law
2 shall be or may become responsible to reclaim the land or treat
3 or abate the water pollution or any person who for consideration
4 or who receives some other benefit through a contract or any
5 person who through a consent order and agreement or is
6 ordered to perform or complete reclamation or treat or abate
7 water pollution as well as a surety which provided a bond for

8 the site is not eligible nor may receive the benefit of the
9 protections and immunities available under this article.

10 (b) *Projects near mining or coal refuse sites.* — This article
11 does not apply to a reclamation project or a water pollution
12 abatement project that is located adjacent to, hydrologically
13 connected to or in close proximity to a site permitted under
14 articles two, three or four of this chapter unless:

15 (1) The reclamation project or water pollution abatement
16 project is submitted to the department in writing before the
17 project is started; and

18 (2) The department finds:

19 (A) The reclamation project or the water pollution abate-
20 ment project will not adversely affect the permittee's obliga-
21 tions under the permit and the applicable law;

22 (B) The activities on the project work area cannot be used
23 by the permittee to avoid the permittee's reclamation or water
24 pollution treatment or abatement obligations; and

25 (3) The department issues a written notice of its findings
26 and the approval of the project.

27 (c) *Projects in lieu of civil or administrative penalties.* —
28 This article shall not apply to a reclamation project or a water
29 pollution abatement project that is performed in lieu of paying
30 civil or administrative penalties.

§22-27-11. Water supply replacement.

1 A public or private water supply affected by contamination
2 or the diminution caused by the implementation of a reclama-
3 tion project or the implementation of a water pollution abate-
4 ment project shall be restored or replaced by the department

5 with an alternate source of water adequate in quantity and
6 quality for the purposes served by the water supply.

§22-27-12. Rules.

1 The department may propose legislative rules in accordance
2 with article three, chapter twenty-nine-a of this code as needed
3 to implement the provisions of this article.

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

Chandy White
Chairman Senate Committee

H. Ruler
Chairman House Committee

Originating in the House.

In effect ninety days from passage.

Daniel Holmes
Clerk of the Senate

Bruce D. Lee
Clerk of the House of Delegates

Carl Ray Tomblin
President of the Senate

[Signature]
Speaker of the House of Delegates

The within is approved this the 5th
day of April, 2005.

[Signature]
Governor

PRESENTED TO THE
GOVERNOR

Date 3/31/05

Time 9:15am