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# Consolidated Environmental Regulation in West Virginia

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# CONSOLIDATED ENVIRONMENTAL REGULATION IN WEST VIRGINIA

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## I. INTRODUCTION

In 1994, West Virginia enacted the single largest piece of legislation in its history. The 1,400-page bill that made up this legislation was the crowning achievement of more than a decade of efforts to consolidate and streamline West Virginia's environmental regulatory programs. The result has been the empowerment of the West Virginia Division of Environmental Protection (DEP) as the centerpiece of environmental regulation in West Virginia.

This Article explores the principal initiatives leading to the passage of the legislation empowering the DEP. In addition, it analyzes the substantive provisions of the DEP's legislative authority and the relationship of that authority to other agencies. Finally, this Article identifies additional areas for the refinement of West Virginia's environmental regulatory programs.

## II. BACKGROUND

Historically, West Virginia's environmental regulatory programs were dispersed over a large number of state and local agencies, creating a patchwork of authorities with attendant complications. Many of

West Virginia's programs predated the establishment of environmental programs at the federal level. Prior to the creation of the United States Environmental Protection Agency (EPA) in 1970 by Executive Order of President Richard M. Nixon,<sup>1</sup> West Virginia had already begun its environmental regulatory programs. This was accomplished principally through the following agencies:

- Air Pollution Control Commission — founded in 1961<sup>2</sup> with responsibility for regulating air pollution from virtually all sources;
- Water Resources Board — founded in 1964<sup>3</sup> with responsibility for establishing water quality standards to protect the State's rivers and streams;
- Department of Natural Resources — founded in 1933<sup>4</sup> with responsibility for protecting the state's water resources and wildlife, among others; and
- Department of Health — founded in 1949<sup>5</sup> with responsibility for regulating sewage treatment and disposal, water supplies and systems, and disease control, among others.

In West Virginia, and elsewhere, early environmental programs evolved in a piecemeal fashion, guided by the perceived need to regulate a particular medium or activity or to address a specific problem or concern. States were reluctant to initiate broad-scale pollution controls for fear that businesses would be at a competitive disadvantage and would seek a more favorable regulatory climate in other less regulated states. The federal government took the lead in environmental regulation by creating an even playing field among the states, thus, addressing the concern that businesses would relocate to seek more favorable environmental regulations. The first of these federal initiatives occurred

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1. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970).

2. 1961 W. Va. Acts ch. 63 (recodified at W. VA. CODE §§ 22-5-1 to -16 (1994) & W. VA. CODE §§ 22B-2-1 to -3 (1994)).

3. 1964 W. Va. Acts ch. 20 (recodified at W. VA. CODE §§ 22B-3-1 to -5 (1994)).

4. 1933 W. Va. Acts, Ex. Sess., ch. 55 (recodified at W. VA. CODE §§ 20-1-1 to -20 (1989)).

5. 1949 W. Va. Acts ch. 101 (recodified at W. VA. CODE §§ 16-1-1 to -21 (1991 & Supp. 1994)).

in 1970, when Congress empowered the EPA to implement the Clean Air Act.<sup>6</sup> This was quickly followed by the EPA receiving authority to implement the Clean Water Act,<sup>7</sup> the Resource Conservation and Recovery Act,<sup>8</sup> and the Toxic Substances Control Act.<sup>9</sup>

Most of these federal programs encouraged delegation to the states. West Virginia sought to have these programs delegated to the various agencies that already existed in the state rather than to reorganize into a central regulatory agency. As a result, in West Virginia these programs were initially delegated to the Department of Natural Resources, the Air Pollution Control Commission, and the Department of Health.

Several states, however, elected to reorganize their agencies into a form that resembled the EPA. According to the National Conference of State Legislatures, approximately thirty-eight states have implemented some form of consolidation.<sup>10</sup> For example, Kentucky established a Department of Environmental Protection in the early 1970s with responsibility for water, waste, air, and environmental services.<sup>11</sup> A cabinet-level Secretary has jurisdiction over the Department of Environmental Protection, the Department of Natural Resources, and the Department of Surface Mining & Reclamation.<sup>12</sup> Other states recognizing the logic in centralized function continue to consolidate their environmental regulatory programs. For instance, Maryland reorganized its programs in 1987, at which time the Department of the Environment was established to manage the key program areas of air, solid and hazardous waste, sediment and stormwater, toxics, environmental science and health, and water management.<sup>13</sup> Similarly, Alabama reorganized in 1982, creating the Department of Environmental Management

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6. 42 U.S.C. §§ 7401-7671q (1988 & Supp. 1994).

7. 33 U.S.C. §§ 1251-1387 (1988 & Supp. 1994).

8. 42 U.S.C. §§ 6901-6992k (1988 & Supp. 1994).

9. 15 U.S.C. §§ 2601-2692 (1988 & Supp. 1994).

10. D. Waldman, *States Consolidation of Environmental Programs*. Report Generated for Oklahoma National Conference of State Legislatures (undated draft attached to L. Morandi, Memorandum Regarding Recent Environmental Agency Reorganization Legislation (Nov. 6, 1991)).

11. 1974 Ky. Acts ch. 74, art. III, KY. REV. STAT. ANN. §§ 224.10-010 to -050 (Baldwin 1991 & Supp. 1994).

12. KY. REV. STAT. ANN. § 224.10-020 (Baldwin 1991 & Supp. 1994).

13. 1987 Md. Laws ch. 306, MD. CODE ANN., ENVIR. §§ 401 (1993 & Supp. 1994).

covering air pollution, water quality, drinking water, and solid and hazardous waste.<sup>14</sup> Furthermore, Louisiana created its Department of Environmental Quality in 1983, with responsibility to regulate solid and hazardous waste handling, water, air, and nuclear and abandoned waste sites.<sup>15</sup> Finally, Arizona enacted an Environmental Quality Act in 1986, which created a cabinet level department to address water quality, air quality, and solid and hazardous waste programs.<sup>16</sup>

In addition, California, Hawaii, New Jersey, New Mexico, Tennessee, and Texas<sup>17</sup> initiated or completed program consolidation in 1991, either through executive order or legislation. These state actions and others point to a clear trend toward combining air, water, and waste programs into a single governmental agency, while distinguishing natural resource management, parks and recreation, and wildlife management. Mining and oil and gas regulation have not consistently been included within or without a consolidated agency. However, air, water, and waste programs, including their sub-areas, have increasingly been placed within a single agency whose primary function is regulation.

While states have a variety of interests in undertaking consolidation, such an initiative can yield many beneficial returns. Notably, reorganization and consolidation can encourage new business and industry by streamlining the regulatory process and providing a unified voice for government to communicate with the regulated community or the EPA in its oversight role. Furthermore, consolidation often creates the opportunity to reduce the number of top management positions and allows limited funds to be used elsewhere.

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14. 1982 Ala. Acts No. 82-612, ALA. CODE §§ 22-22A-1 to -16 (1990).

15. 1983 La. Acts. No. 97, LA. REV. STAT. ANN. §§ 30:2001-2011 (West 1989 & Supp. 1994).

16. 1986 Ariz. Sess. Laws ch. 368, ARIZ. REV. STAT. ANN. § 49-102 (1988 & Supp. 1994).

17. L. Morandi, Memorandum Regarding Recent State Environmental Agency Reorganization Legislation (Nov. 6, 1991).

### III. EARLY LEGISLATIVE INITIATIVES

In advance of efforts to achieve outright consolidation of environmental programs, West Virginia sought to cope with its multiple agencies through two principal mechanisms. The first involved coordinating legislation, such as was used to regulate hazardous waste and groundwater. The second involved a direct effort to consolidate the regulatory programs relating to the extraction of coal, oil and gas, and other mineral resources. These initiatives served to test several regulatory concepts that would later become the underpinnings for the establishment of a consolidated environmental agency.

#### A. *Hazardous Waste Management Act*

One of the first efforts to address West Virginia's dispersed regulatory authority was the Hazardous Waste Management Act, passed in 1981.<sup>18</sup> This legislation provided the state with the statutory authority to develop a regulatory program that allowed it to receive delegation of the federal hazardous waste regulatory program pursuant to the Resource Conservation and Recovery Act.<sup>19</sup> While designating the Department of Natural Resources (DNR) (now DEP) as the lead agency for purposes of the state's hazardous waste program, the legislation delegated authority for administering portions of the program to the following agencies: Commissioner of Highways; Public Service Commission; Board of Health; Air Pollution Control Commission; Water Resources Board; and Office of Oil and Gas. In each case, however, the Director of the DNR was given an advisory and coordinating role to ensure consistency among the various agencies involved.

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18. H.B. 1479, Reg. Sess. (1981) (codified at W. VA. CODE §§ 22-18-1 to -20 (1994)). For a detailed analysis of this legislation, see David M. Flannery & Kim Brown Poland, *Hazardous Waste Management Act — Closing the Circle*, 84 W. VA. L. REV. 347 (1984).

19. 42 U.S.C. §§ 6901-6992k (1988 & Supp. 1994).

### *B. Groundwater Protection Act*

In 1991, the passage of the Groundwater Protection Act (GPA) divided the authority to administer groundwater regulation among several state offices that have been denominated "groundwater regulatory agencies."<sup>20</sup> These include the DEP, the Department of Agriculture, the Division of Health, and any other agency designated by the DEP Director. No other agencies have been so designated to date, thus precluding any agency other than those named in the statute from regulating groundwater. Each of these agencies is responsible for ensuring compliance with the GPA among the facilities and activities it regulates. The DEP is the designated lead agency. In addition to implementing the GPA among the agricultural community, the Department of Agriculture regulates the use and application of pesticides and fertilizers by anyone in the state.<sup>21</sup> The Division of Health also regulates public water systems and prescribes maximum contaminant levels for those systems.<sup>22</sup> The DEP has the greatest responsibility, as it is charged with applying the GPA to the facilities it regulates as well as all facilities or activities not regulated by another agency. The DEP must also coordinate the groundwater protection efforts of the other groundwater regulatory agencies. The DEP Director is aided and advised by a groundwater coordinating committee.<sup>23</sup>

Groundwater regulatory agencies are charged with imposing groundwater protection practices on the facilities and activities under their jurisdiction in order to protect existing groundwater quality. The practices must include management practices that address facility design, operational management, closure, remediation, and monitoring.<sup>24</sup>

The groundwater protection requirements are imposed by rules, permits, policies, and design standards developed by the groundwater regulatory agencies. Every state and local authority issuing permits,

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20. W. VA. CODE § 22-12-5(b) (1994).

21. W. VA. CODE §§ 19-16A-1 to -27 (1993).

22. W. VA. CODE § 16-1-9a (1991).

23. W. VA. CODE § 22-12-7 (1994).

24. W. VA. CODE § 22-12-5(d) (1994).



licenses, registrations, or other authorizations for facilities or activities that could affect groundwater is required to submit each permit or license to the DEP Director for approval.<sup>25</sup> The DEP Director then considers whether the permit, license, or other authorization provides for protection of groundwater. If not, the DEP Director is empowered to withhold certification and effectively deny the permit or license. In the alternative, he or she may grant certification, or grant certification with conditions. The DEP Director also has authority to grant general groundwater certification or waive certification for classes of activities. For example, the DEP Director might waive certification for all septic tanks that are properly installed and inspected by local health authorities.

While the various agencies charged with responsibility under the GPA must strive to protect groundwater quality standards, only the DEP Director may grant exceptions to those requirements.<sup>26</sup>

### C. *Energy Act*

In 1985, West Virginia took its first significant step towards the actual consolidation of the state's environmental regulatory programs with the passage of the Energy Act. The Energy Act created the Department of Energy and took a major step towards consolidation of some of the most significant regulatory and permitting programs affecting the coal and oil and gas industries that had been previously divided between the Department of Natural Resources and the former Department of Mines. The principal regulatory programs transferred to the Department of Energy included:

- Underground Mining Safety — previously regulated by the Department of Mines;
- Surface Mining Regulation — previously regulated by the Department of Natural Resources;
- Oil and Gas Well Work — previously regulated by the Department of Mines;

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25. W. VA. CODE § 22-12-8(b) (1994).

26. W. VA. CODE § 22-12-5(f), (l) (1994).

- Water Pollution Control — previously regulated by the Department of Natural Resources;
- Solid Waste Disposal — previously regulated by the Department of Natural Resources;
- Dam Control — previously regulated by the Department of Natural Resources; and
- Hazardous Waste Management — previously regulated by the Department of Natural Resources.<sup>27</sup>

As significant as the Energy Act was to the streamlining of energy related permits, it left intact the permitting and regulatory authority of the following agencies, each of which continued to exert independent regulatory authority over coal and oil and gas operations: Air Pollution Control Commission; Water Resources Board; Reclamation Board of Review; Board of Appeals; Board of Coal Mine Health and Safety; Shallow Gas Well Review Board; Oil and Gas Conservation Commission; Board of Miner Training, Education and Certification; Mine Inspectors' Examining Board; and Oil and the Gas Inspectors' Examining Board.<sup>28</sup>

Furthermore, the Energy Act did nothing to consolidate the environmental permits or licenses affecting other industries. Manufacturing operations, for example, continued to be subject to the independent regulatory requirements of such agencies as: Department of Natural Resources; Water Resources Board; Board of Health; Department of Agriculture; Commissioner of Highways; Public Service Commission; Air Pollution Control Commission; Department of Energy; and the Shallow Gas Well Review Board. As a result, whenever a new facility was to be constructed or an existing facility was to be audited for regulatory compliance, the statutes, regulations, guidelines, and policies of each of these separate regulatory agencies had to be considered.

While the Energy Act brought about some measure of consolidation of environmental responsibility with respect to coal and oil and gas operations, it left much more to be done. Almost immediately

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27. W. VA. CODE chs. 22, 22A, 22B (1985).

28. *Id.*

following passage of the Energy Act, new legislation was introduced to reorganize the state's remaining environmental programs.<sup>29</sup> However, none of these proposals were enacted.

#### IV. DIVISION OF ENVIRONMENTAL PROTECTION

One of the first initiatives undertaken by Governor Gaston Caperton when he took office in 1991 was the introduction of legislation to create the Division of Environmental Protection and to begin the process of consolidating the state's environmental regulatory programs. These initiatives were, in part, in response to Governor Caperton's efforts to streamline government and, in part, in response to criticism that had been directed at the Department of Energy's administration of the federally delegated surface mining reclamation program.

##### A. DEP Creation

In 1991, the Legislature passed House Bill 217<sup>30</sup> creating the Division of Environmental Protection (DEP) which empowered the new agency with the authority previously granted to the Department of Energy.<sup>31</sup> An exception to that delegation of authority involved miners' health, safety, and training which was placed with the Office of Miners Health, Safety, and Training.<sup>32</sup> House Bill 217 gave the Governor the power, through executive order, to transfer to the DEP any functions of the DNR related to environmental protection or any other functions of the Department of Commerce, Labor, and Environmental Resources within which the DEP was initially formed. House Bill 217 also created the Division of Environmental Protection Reorganization Advisory Board (Advisory Board), which consisted of fourteen members appointed by the Governor. The Advisory Board was initially empowered with responsibility for advising the Governor on the transfer of regulatory functions by executive order. Later, the Advisory

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29. S.B. 354, Reg. Sess. (1987).

30. 1991 W. Va. Acts, 2d Ex. Sess., ch. 15; H.B. 217, 2d Ex. Sess. (1991).

31. W. VA. CODE § 22-1-7(a) (1985), *repealed by* W. VA. CODE § 21-1-7 (1991).

32. W. VA. CODE § 22A-7-1 (Supp. 1992).

Board met extensively to prepare legislation codifying the changes made by executive order and recommending additional reorganization changes.

### *B. Caperton Executive Order*

Executive Order No. 8-92, effective July 1, 1992, was issued by Governor Caperton pursuant to House Bill 217, effectively transferring the remaining environmental offices and functions from the DNR to the DEP. In addition, the Executive Order transferred to the DEP all powers and duties of the Air Pollution Control Commission and Water Resources Board other than appellate and certain rulemaking responsibilities.

The Executive Order authorized the Advisory Board to continue to meet and to make additional recommendations regarding the DEP's reorganization. Specifically, the Executive Order identified the following issues for the Advisory Board to address: administrative appeals and rulemaking structure for environmental matters; levels of compensation for the various offices of the DEP; equipment available to the DEP staff to carry out its mission; use of both classified and exempt positions in the offices of the DEP; impact of consolidation on the effectiveness of the State's environmental program; and additional changes which may be advisable.

### *C. DEP Reorganization Advisory Board*

The Advisory Board was appointed by Governor Caperton and convened in March, 1992. Membership of the Advisory Board was comprised of industry, environmental, public administration, and legislative representatives. Each of the members of the Advisory Board were selected by the Governor based upon their active roles in environmental issues and government management.<sup>33</sup>

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33. The members of the Advisory Board were:

Industry: Cliff Adkins, Thad Epps, William B. Raney, and David M. Flannery.

Environmental: Becky Cain, Jim Kotcon, Cindy Rank, and Perry McDaniel.

Public Administrative: Joe Blakeley.

After many months of negotiation and drafting, the Advisory Board submitted to Governor Caperton a bill of some 1,400 pages in length that would accomplish the intended reorganization of West Virginia's environmental regulatory programs. That bill was introduced in the 1993 Regular Legislative Session,<sup>34</sup> however, it was not enacted in 1993.

#### *D. DEP Reorganization Bill*

Following the unsuccessful attempt to enact the DEP Reorganization Bill in 1993, a Joint Judiciary Subcommittee was appointed to study the bill with a goal toward the introduction of legislation during the early stages of the 1994 Regular Session of the Legislature. The 1994 DEP Reorganization Bill, referred to as House Bill 4065, was introduced as anticipated and was passed by the Legislature on March 12, 1994. Governor Caperton signed the DEP Reorganization Bill into law on April 30, 1994. It took effect on June 10, 1994.<sup>35</sup>

Subsequent to the passing of the DEP Reorganization Bill, the 1994 Legislature determined that further revision was required with regard to solid waste landfill issues. As a result, Senate Bill 1021 was introduced and passed during the first Extraordinary Session of 1994.<sup>36</sup> Governor Caperton signed Senate Bill 1021 into law on April 6, 1994. Senate Bill 1021 modified House Bill 4065. The following is a summary of the principal changes to the state's environmental laws that resulted from the passage of the DEP Reorganization Bill, House Bill 4065, and Senate Bill 1021.

#### 1. Rulemaking Authority

The rulemaking structure for environmental matters was specifically identified within Executive Order No. 8-92 as an issue which should

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House of Delegates: Honorable Rick Stanton and Honorable Phyllis J. Rutledge.

Senate: Honorable Charles B. Felton, Jr. and Honorable William R. Wooton.

34. S.B. 354, Reg. Sess. (1993).

35. 1994 W. Va. Acts ch. 61; H.B. 4065, Reg. Sess. (1994).

36. 1994 W. Va. Acts, 1st Ex. Sess., ch. 31; S.B. 1021, 1st Ex. Sess. (1994).

be addressed by the DEP Reorganization Bill. Enhancing the public's access to the rulemaking process was identified by the Advisory Board as a primary goal for revising rulemaking procedures. It was also recognized that conformity among state agencies with regard to rulemaking procedures would provide for consistent rulemaking.

The transfer of rulemaking from the Air Pollution Control Commission (APCC) and the Water Resources Board (WRB) to the DEP was debated extensively within the Advisory Board. It was recognized that having rulemaking authority with the APCC and the WRB caused rulemaking to be conducted "in the sunshine," since all such proceedings would be subject to the Open Governmental Proceeding Act.<sup>37</sup>

With the passage of this legislation most rulemaking authority of the APCC and the WRB was transferred to the DEP.<sup>38</sup> To address concerns about the possible reduction of public involvement in such a transfer, the legislation provided that at least one public hearing must be held in conjunction with each rulemaking.<sup>39</sup> Previous law allowed, but did not mandate, such a public hearing.<sup>40</sup>

## 2. Rulemaking Procedure

Two significant changes were made to the DEP's rulemaking procedures. The first provides that the DEP Director may determine, after required consultation with the newly created Division of Environmental Protection Advisory Council (Advisory Council), that a new rule (including new changes to existing rules) should be the same in substance as a counterpart federal regulation.<sup>41</sup> Upon such a determination, to the greatest degree practicable, the new or proposed rule shall incorporate by reference the counterpart federal regulation. The DEP Director is required to file with every new rule a statement that describes

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37. W. VA. CODE §§ 6-9-1 to -7 (1993 & Supp. 1994).

38. W. VA. CODE §§ 22-5-4, -11-4, -11-6 (1994).

39. W. VA. CODE § 22-1-3(e) (1994).

40. W. VA. CODE § 29A-3-5 (Supp. 1994).

41. W. VA. CODE § 22-1-3(c) (1994).

whether or not the rule is the same in substance as the counterpart federal regulation.<sup>42</sup>

An additional change to the rulemaking process requires the DEP Director to provide a rationale for deviation from the substantive provisions of counterpart federal programs.<sup>43</sup> This provision was amended into the legislation by the Senate Committee on the Judiciary to provide a mechanism to assure the parity between state and federal environmental regulatory programs. Prior to the passage of this legislation, only the Groundwater Protection Act,<sup>44</sup> the Underground Storage Tank Act,<sup>45</sup> the Hazardous Waste Management Act,<sup>46</sup> and the Air Pollution Control Act<sup>47</sup> contained provisions requiring that state requirements be no more stringent than comparable federal requirements. The amended provision preserves the "no more stringent than" provisions of the Groundwater Protection Act, the Underground Storage Tank Act, and the Hazardous Waste Management Act. In addition, it provides that all other legislative rules promulgated by the DEP after July 1, 1994, may include provisions more stringent than the federal counterpart, but only if the DEP Director sets forth written reasons for the more stringent regulation.<sup>48</sup>

The DEP Director is now required to take into consideration scientific evidence, scientific environmental characteristics of West Virginia or an area thereof, or stated legislative findings, policies, or purposes relied upon in proposing regulations that are either more or less stringent than the federal counterpart. In the case of rules which have a technical basis, the Director is required to provide the specific technical basis upon which the rule was developed. In the absence of a federal rule, the adoption of a state rule shall not be construed to be more stringent than the federal, unless the absence of a federal rule is the result of a federal exemption. For provisions less stringent than a fed-

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42. *Id.*

43. W. VA. CODE § 22-1-3a (1994).

44. W. VA. CODE § 22-12-4 (1994).

45. W. VA. CODE § 22-17-6 (1994).

46. W. VA. CODE § 22-18-6 (1994).

47. W. VA. CODE § 22-5-4 (1994).

48. W. VA. CODE § 22-1-3a (1994).

eral counterpart, the DEP Director is also required to set forth written reasons for such differences.<sup>49</sup>

In order to give the reviewing public insight into the DEP's thought process in promulgating rules, the Legislature deemed it appropriate to require the DEP to file a statement with the proposed rule that describes whether or not it is the same in substance as the federal counterpart regulation. If, however, the new rule is not to be the same in substance as the federal regulation, the DEP Director must provide a rationale for any deviation from the federal program.<sup>50</sup>

### 3. Advisory Council

The legislation creates a standing Advisory Council, with a balanced membership, to consult with the DEP Director on rulemaking and other related policy issues.<sup>51</sup> The concept for the development of the Advisory Council was originally introduced to the Advisory Board by the DEP itself. The Advisory Council is designed to identify and define problems associated with the implementation of the policy statement of the statute, to provide to industry and the public early identification of major federal program and regulatory changes, to resolve conflicts between constituency groups, and to strive for consensus on environmental policy.<sup>52</sup>

The Advisory Council consists of seven members. The DEP Director serves as an *ex officio* member of the council and as its chair. The remaining six members are appointed by the Governor. Industries regulated by the DEP or their trade associations are represented by two members on the Advisory Council. Environmental advocates are also represented by two members on the Advisory Council. Organizations representing local government are represented by one member on the Advisory Council. Finally, one member on the Advisory Council represents public service districts.<sup>53</sup>

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49. *Id.*

50. *Id.*

51. W. VA. CODE § 22-1-9 (1994).

52. *Id.*

53. *Id.*



The Advisory Council is required to provide a report setting forth its evaluation of the DEP's performance to the Joint Committee on Government and Finance by the first of January of each year. The report must specifically address the DEP's performance in accomplishing the DEP's nine statutory purposes.<sup>54</sup>

#### 4. Special Revenue Accounts

In an effort to discharge its statutory duty to consider the levels of compensation in various offices of the DEP, as well as to assess and ensure that the equipment available to the DEP staff was appropriate to carry out its mission, the Advisory Board recommended that all monies received and collected for accounts under the environmental laws be

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54. W. VA. CODE § 22-1-10(e)(6) (1994). DEP's nine purposes are:

(1) To strengthen the commitment of this state to restore, maintain, and protect the environment;

(2) To consolidate environmental regulatory programs in a single state agency;

(3) To provide a comprehensive program for the conservation, protection, exploration, development, enjoyment, and use of the natural resources of the state of West Virginia;

(4) To supplement and complement the efforts of the state by coordinating state programs with the efforts of other governmental entities, public and private organizations, and the general public; to improve the quality of the environment, the public health and public enjoyment of the environment, and the propagation and protection of animal, aquatic, and plant life, in a manner consistent with the benefits to be derived from strong agricultural, manufacturing, tourism, and energy-producing industries;

(5) Insofar as federal environmental programs require state participation, to endeavor to obtain and continue state primacy in the administration of such federally-mandated environmental programs, to endeavor to maximize federal funds which may be available to accomplish the purposes of the state and federal environmental programs, and to cooperate with the appropriate federal agencies to meet environmental goals;

(6) To encourage the increased involvement of all citizens in the development and execution of state environmental programs;

(7) To promote improvements in the quality of the environment through research, evaluation and sharing of information;

(8) To improve the management and effectiveness of state environmental protection programs; and

(9) To increase the accountability of state environmental protection programs to the governor, the Legislature, and the public generally.

W. VA. CODE § 22-1-1 (1994).

credited to special revenue accounts. These special revenue accounts would be created in the State Treasury dedicated to support only the environmental program under which the monies were collected.<sup>55</sup> This protection for the DEP's accounts was proposed by the Advisory Board to eliminate the potential diversion of monies to some purpose other than that for which the revenues were generated. The 1994 Legislature removed this proposal from the DEP Reorganization Bill citing its interest in preserving the Legislature's complete authority to direct the expenditure of state funds. The DEP special revenue accounts will, therefore, continue to be subject to general legislative appropriation and transfer to other accounts.<sup>56</sup>

A similar result occurred with respect to an Advisory Board proposal that the provision addressing the "air pollution control fund" be amended to prohibit the transfer of excess funds to other state accounts. The House Committee on the Judiciary rejected a proposal to prohibit the transfer of special revenue dollars and restored the language to its original form after the bill was introduced. As passed, the legislation contains a provision<sup>57</sup> that reflects the original statutory provision of the Air Pollution Control Act allowing the transfer of funds and creating significant questions as to whether this funding mechanism will satisfy the requirements of the federal Clean Air Act.<sup>58</sup>

## 5. Notification of Permit Decisions

Upon the recommendation of the Advisory Board, the Legislature approved a provision that provides for the right of any person to request to be notified of a DEP permit decision.<sup>59</sup> This provision resulted from concern over the need to enhance outreach to the public and to provide to the public the opportunity to participate more fully in the

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55. H.B. 354, Reg. Sess. (1993).

56. W. VA. CODE § 12-2-2(c) (Supp. 1994).

57. W. VA. CODE § 22-5-4(a)(17)(E) (1994).

58. The federal Clean Air Act, 42 U.S.C. § 7661a(b)(3)(C)(iii) (Supp. 1994), provides that fees collected by a state must be used solely to cover all reasonable costs required by the air pollution permit program.

59. W. VA. CODE § 22-1-13 (1994).

environmental permitting process. Any person may request that the DEP Director provide notification of a decision to issue or deny a specific permit. The request must be in writing and received by the Director within the public comment period or at a public hearing held for the specific permit application. In those cases where there is neither a public comment period nor a hearing, the Director is required to make the notification only if the request for notification is timely received. The Director is, however, required to notify all persons who have made a timely request of the decision on the application at the same time the applicant is notified of the decision.<sup>60</sup>

## 6. Laboratory Certification

A certification program for in-state laboratories providing data and analysis to the DEP was adopted by the Legislature at the recommendation of the Advisory Board. The laboratory certification program includes a fee structure to finance the program and mandates that the DEP Director develop a laboratory certification program.<sup>61</sup> Approximately 250 laboratories exist statewide that are expected to be subject to these certification requirements.

The DEP Director is required to promulgate rules that require the certification of laboratories conducting waste and wastewater tests and analyses used for compliance demonstrations under environmental programs. The DEP Director must promulgate rules establishing reasonable annual certification fees (not exceeding an aggregate of \$150,000) based upon the type of classification of tests or analyses being conducted.<sup>62</sup> The fee would be assessed against laboratory owners or operators in an amount that would cover the actual costs of administration of the program.

Pursuant to this provision, waste and wastewater tests and analyses conducted in laboratories that are not certified will not be accepted by the DEP. Such certification rules are not, however, applicable to field tests and remote monitoring. Certification for out-of-state laboratories is

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60. *Id.*

61. W. VA. CODE § 22-1-15 (1994).

62. *Id.*

included in this regulatory program. Certification will be renewed on an annual basis, provided a laboratory can demonstrate compliance with performance standards as set by the DEP. Certification will be revoked or suspended for failure to comply with the requirements of the applicable analytical methods and procedures. All persons subject to the covered statutory programs are required to use data or test results from certified laboratories for the purposes of demonstrating compliance.<sup>63</sup>

## 7. Taking of Private Property

A "taking" provision was added to the DEP Reorganization Bill by the House Committee on the Judiciary. Generally, this provision was designed to protect property owners' rights along streams through private property in which fifty-foot buffer zones were established by the DEP.<sup>64</sup> The statute provides that the DEP implement specific procedural safeguards to ensure constitutional protection of real property rights for a limited set of the DEP's actions. Takings assessments are not required in the case of an emergency, licensing or permitting conditions to the use of real property, statutory and administrative rules, and emergency rules or statutory or administrative enforcement actions.<sup>65</sup>

Under the statute, the DEP is required to prepare a takings assessment based on the following criteria: (1) an identification of the risk created by the private real property use, and a description of the environmental, health, safety, or other benefit to be achieved by the action; (2) the anticipated effects on other real property owners or the environment if the DEP does not take the proposed action; (3) an explanation of how the DEP believes its action advances the purpose of protecting against the risk; (4) the reasons that the DEP believes that its actions are likely to result in requiring the state to compensate the owner, including a description of how the action affects the user value of the property; (5) an alternative to the proposed action to reduce the

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63. *Id.*

64. W. VA. CODE §§ 22-1A-1 to -6 (1994).

65. W. VA. CODE § 22-1A-3 (1994).

impact on the property; and (6) an estimate of the cost to the state for compensation.<sup>66</sup>

In order for the DEP to require that a buffer zone be created on private real property, a report must be prepared that identifies the public purpose or policy which is being served and how it is being served by such action.

### 8. Air Pollution Rules

The DEP Reorganization Bill transfers all air pollution rulemaking authority to the DEP Director.<sup>67</sup> This amendment has the effect of making the Air Pollution Control Commission (now the Air Quality Board) solely an appellate body with no responsibilities for rulemaking or program implementation. This transfer of rulemaking authority to the DEP Director was recommended to the Legislature by the Advisory Board in furtherance of streamlining the rulemaking process.

The Reorganization Bill also approved a recommendation of the Advisory Board authorizing the DEP Director to promulgate rules authorizing permit transfers.<sup>68</sup> Previously, no statutory authority addressed this issue. This amendment conforms the air pollution program requirement to the permit transfer authorization of other programs.

### 9. Water Pollution Rules

The Reorganization Bill also adopted the recommendation of the Advisory Board that authority for rulemaking on all water pollution matters (other than the setting of water quality standards for groundwater and surface water) be transferred to the DEP Director from the Water Resources Board.<sup>69</sup> This change was intended to streamline the administrative authority for the water pollution regulatory program, leaving the Water Resources Board (renamed the Environmental Quali-

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66. *Id.*

67. W. VA. CODE § 22-5-4 (1994).

68. W. VA. CODE § 22-5-4(a)(17) (1994).

69. W. VA. CODE § 22-11-4 (1994).

ty Board) with a more limited role of setting water quality standard regulations and hearing appeals.<sup>70</sup>

#### 10. Notice of Appeal Period

The time period for filing an appeal to an appellate board for an action by the DEP has been clarified in the Reorganization Bill. The legislation adopted a recommendation of the Advisory Board providing that the time period for filing appeals begins to run as of the date of receipt (in the case of the permittee) or as of the date of service (in the case of all others).<sup>71</sup>

#### 11. Environmental Advocate

A floor amendment to the Reorganization Bill created the Environmental Advocate position within the DEP. The DEP Director is authorized to appoint a person to serve as the Environmental Advocate within the DEP with the power of that position to be determined by rule.<sup>72</sup> Creation of the position was designed to provide additional input by citizens into the development of statewide regulations. This position was designed to provide for enhanced discussion of the development of environmental policy by citizen advocates, the regulated community, and the DEP.

The rules for the Environmental Advocate were filed with the Secretary of State on December 9, 1994, and become effective on January 9, 1995.<sup>73</sup> The key provisions of the rules provide for the appointment, salary, and qualifications of the Environmental Advocate. The appointment is made by the Director of the DEP. An applicant for the Environmental Advocate position must be a resident of West Virginia, possess a four-year college degree, completed two years full-time work experience directly relating to environmental protection, possess a working familiarity with the legal requirements and programmatic func-

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70. W. VA. CODE § 22B-3-4 (1994).

71. W. VA. CODE § 22B-1-7 (1994).

72. W. VA. CODE § 22-20-1 (1994).

73. 38 W. VA. C.S.R. 10 (1995).

tions of the DEP, demonstrate written and oral communication skills, and have a valid driver's license.<sup>74</sup>

Logistic support for the Environmental Advocate position is provided by the DEP and includes: office space, equipment, supplies and clerical support, reimbursement for per-diem (food and miscellaneous expense allowance), and travel expenses, including necessary use of the DEP vehicles.<sup>75</sup>

The Environmental Advocate position provides for the collection and dissemination of information available from the agency, assistance to citizens in obtaining information, response to complaints, and preparation of press releases.<sup>76</sup> The accessibility to confidential information by the Environmental Advocate and the authority to disseminate that information is subject to all the pertinent statutes and regulations protecting confidential information from unlawful disclosure. Any confidential information acquired by, or in the possession of, the Environmental Advocate will be kept in confidence and not disseminated to the public.

The Environmental Advocate may not pursue legal action opposing or supporting the DEP on behalf of the Office of the Environmental Advocate without the express approval of the Director and under the direction of the DEP's general counsel.<sup>77</sup> Similarly, the Environmental Advocate may not in any official capacity engage in organized campaigns in support of, or in opposition to, official positions taken by the DEP.<sup>78</sup> Central to all of these issues is the expenditure of state tax monies to fund a special interest.

## 12. Oil and Gas Inspectors

The Reorganization Bill adopted an Advisory Board proposal to revise the membership of the Oil and Gas Inspector Licensing Board (Licensing Board) as an alternative to the transfer of its authority to

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74. 38 W. VA. C.S.R. 10, § 2 (1995).

75. 38 W. VA. C.S.R. 10, § 3 (1995).

76. 38 W. VA. C.S.R. 10, §§ 4, 5 (1995).

77. 38 W. VA. C.S.R. 10, § 4.9 (1995).

78. 38 W. VA. C.S.R. 10, § 4.10 (1995).

the DEP Director. As revised, the Licensing Board now consisting of five members. Two members are *ex officio* and three are appointed by the Governor. One appointed member is a representative of the public at large and is required to be a person who is knowledgeable about oil and gas inspector licensing issues, but would otherwise have no direct or indirect financial interest in oil and gas production. An exception is made for the receipt of royalty payments which do not exceed a five-year average of six hundred dollars. One position on the Licensing Board is to be filled by a representative of the independent oil and gas industry. Major oil and gas producers also have a single position on the Licensing Board. The Chief of the Office of Oil and Gas and the Chief of the Office of Water Resources are *ex officio* members. The appointed members are assigned overlapping terms of six years as opposed to the former provision which provided for terms of eight years.<sup>79</sup> The revised composition of the Licensing Board was intended to serve the purpose of providing a balance of environmental and economic interests. This balance was critical to maintain the Licensing Board as a body independent of the DEP Director.

Oil and Gas Inspector qualifications were also revised pursuant to recommendation by the Advisory Board.<sup>80</sup> The qualifications of inspectors were amended so that an oil and gas inspector must: (1) be a citizen of West Virginia; (2) have at least six years actual relevant experience in the industry; and (3) have good theoretical and practical knowledge of oil and gas drilling and production methods, practices and techniques, sound safety practices, and applicable mining laws.<sup>81</sup>

### 13. Environmental Appellate Boards

Much of the debate surrounding the Reorganization Bill concerned the roles of the three appellate boards: the Air Pollution Control Commission; the Water Resources Board; and the Reclamation Board of Review. Consideration was given to consolidating staffs for all of the appeal boards yet allowing the separate boards to exist with their spe-

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79. W. VA. CODE § 22C-7-3(a) (1994).

80. W. VA. CODE § 22C-7-2 (1994).

81. W. VA. CODE § 22C-7-2(a) (1994).



cial expertise. The range of options discussed also included abolishing all of the current boards and creating a consolidated full-time environmental board. Concerns were expressed, however, that if combined into a single entity for the purpose of hearing appeals, the added expense of creating a body that would require full-time employment by state government would not be justifiable.

The Advisory Board consulted with each of the appellate boards to discuss their needs and concerns. Staffing and funding were identified as the major issues confronting each of these appellate boards.

Ultimately, the Advisory Board rejected consolidation of the appellate boards in favor of providing some procedural modifications to create uniformity among the appellate boards. The Advisory Board recommended the reorganization of the appellate boards' statutory provisions by consolidating them.<sup>82</sup> The statute now contains a general provision applicable to each appellate board which allows discovery in appeal hearings as a matter of right with respect to issue identification and expert witnesses.<sup>83</sup> The statute was revised to allow other discovery as is permitted by the board.<sup>84</sup> The statute also includes a provision that allows the Director, Chief, or appellate board to suspend an appealed order or fix the terms of the action appealed for unjust hardship.<sup>85</sup> It was determined that each appellate board should be given the authority to visit the physical location of the source that is the subject of the appeal.<sup>86</sup> Although discussion was held concerning whether or not it would be appropriate to create further consistency among the appellate boards by establishing a uniform standard of review among the three boards, this concept was deferred for future legislation.

The appellate boards were given new titles as follows: the Air Pollution Control Commission was changed to the Air Quality Board,<sup>87</sup> the Water Resources Board was changed to the Environmen-

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82. W. VA. CODE ch. 22B (1994).

83. W. VA. CODE § 22B-1-8 (1994).

84. *Id.*

85. W. VA. CODE § 22B-1-7(d) (1994).

86. W. VA. CODE § 22B-1-5(3) (1994).

87. W. VA. CODE § 22B-2-1(a) (1994).

tal Quality Board,<sup>88</sup> and finally, the Reclamation Board of Review was changed to the Surface Mine Board.<sup>89</sup> These boards have maintained their original functions with the exception of promulgating rules and regulations. The development of water quality standards for groundwater and surface water, however, remain with the Environmental Quality Board.<sup>90</sup> The primary function of each of these boards is that of an appellate board, since most rulemaking authority has now been moved to the Director of the DEP.

#### 14. Technical Amendments

In addition to the reorganization of the DEP, the Reorganization Bill made several technical amendments to the state's statutes involving coal mining.<sup>91</sup> In addition, the authorized time period for extension of expiring water pollution permits was modified.<sup>92</sup> There were also

88. W. VA. CODE § 22B-3-1(a) (1994).

89. W. VA. CODE § 22B-4-1(a) (1994).

90. W. VA. CODE § 22B-3-4 (1994).

91. The amendments to the mining laws included:

Stream Restoration — The Stream Restoration Fund for the restoration and enhancement of streams degraded by acid mine drainage was modified by the Reorganization Bill. W. VA. CODE § 22-1-14 (1994).

Abandoned Mine Land Expenses — The Reorganization Bill clarifies DEP's authority to expend abandoned mine lands' funds for administrative and personnel expenses. W. VA. CODE § 22-2-4(b)(3) (1994).

Surface Mining Permit Applications — A provision has been inserted to provide that if the DEP Director finds that the probable total annual production at all locations of any coal surface-mining operator will not exceed 300,000 tons (small coal operators), federally funded studies shall be conducted by DEP as provided by the U.S. Department of Interior. W. VA. CODE § 22-3-9(b) (1994). This revision modifies the statute to be consistent with the current federal regulatory program. The Reorganization Bill also included a provision which creates an obligation for the DEP to advise an operator within five days of the completeness of a permit application. Completeness will be limited to "administrative" completeness. *Id.* The applicant violator system statutory provisions were also clarified to allow the DEP to consider a pattern of noncompliance of any regulatory program implementing the federal surface mining law. The legislation adopted a revision which allows the DEP Director to withhold issuance of a permit if there is a demonstration of willful violations of the WV Surface Mining Control and Reclamation Act or other state or federal programs implementing the federal Surface Mining Control and Reclamation Act of 1977. W. VA. CODE § 22-3-18(c) (1994).

92. The amendments to the water pollution permit requirements included:

many technical changes in the statutes related to solid waste.<sup>93</sup> Finally,

**Water Pollution Permits** — The Senate Committee on the Judiciary amended the time period over which a water pollution permit could be extended. W. VA. CODE § 22-11-11(c) (1994). As amended, an extension of time not to exceed twelve months could be granted by the Director beyond the expiration date for a permit. The amended language also provides for successive extensions not to exceed twelve months if the Chief of the Office of Water Resources determines additional time is not necessary in order to process an application for permit reissuance. *Id.* Previously, the statute provided that a permit may be reissued for a term not to exceed 120 months beyond the initial fixed term.

93. The amendments to the solid waste statutes included:

**Solid Waste Facility Operator** — The Solid Waste Management Act was revised by the Legislature to add a new definition for “solid waste facility operator.” W. VA. CODE § 22-15-2(31) (1994). This amendment provides that “any person or persons possessing or exercising operational, managerial or financial control over a commercial solid waste facility, whether or not such person holds a certificate of convenience and necessity or a permit for such facility” is considered a solid waste facility operator. *Id.*

**Expired Landfill Permit** — The Reorganization Bill adopted a proposal to authorize the DEP to use compliance orders to regulate landfills with expired Health Department permits. The DEP Director may now enter an administrative order to govern landfills with expired Health Department permits until final permitting action is taken. W. VA. CODE § 22-15-10(d) (1994). **Tipping Fee Equalization** — The Reorganization Bill eliminated the differential in tipping taxes between in-shed and out-of-shed wastes. W. VA. CODE §§ 22-15-11, -15-20, -16-4 (1994). The statute now provides that a solid waste assessment fee imposed upon the disposal of a solid waste (without distinguishing between in-shed and out-of-shed) should be in the amount of \$1.75 per ton or part thereof of solid waste. W. VA. CODE § 22-16-4(a) (1994).

**Limitation on Landfill Closure Assistance** — S.B. 1021 modified existing law to provide that any permittee which is a municipality, county, county solid waste authority, or regional solid waste authority and which has been required to close a landfill will be eligible for closure assistance. W. VA. CODE § 22-16-10 (1994). This closure assistance would cover any closure costs that exceed the amount that has been set aside for closure expenses. The revised statute also provides that if the permittee continues to accept solid waste after receiving such closure assistance, the payment of the “solid waste assessment fee” by that permittee will satisfy both the repayment of any such closure assistance and the payment of the solid waste assessment fee. *Id.*

**Closure Cost Assistance Fund** — The Reorganization Bill provided for the expansion of sources of money to the Closure Cost Assistance Fund, including solid waste assessment fees and penalties collected under W. VA. CODE §§ 22-16-4, -12 (1994). The Reorganization Bill also provided the Solid Waste Management Board, upon approval of the DEP Director, the authority to pledge the revenues paid into the Closure Cost Assistance Fund to meet the requirements of any revenue bond issue. *Id.*

**Public Service Commission** — The jurisdiction of the Public Service Commission over solid waste facilities was revised to eliminate language that previously preserved the right for existing county or regional approval for disposal rates and fees. The Code was amended to provide that the Public Service Commission was required to establish, prescribe, and enforce rates and fees charged by commercial solid waste facilities. W. VA. CODE § 24-

three relatively minor adjustments were made to the hazardous waste statutes.<sup>94</sup>

*E. Abolishment of the Department of Commerce, Labor, and Environmental Resources*

At the request of the Governor, the Legislature also took action in 1994 to abolish the Department of Commerce, Labor, and Environmental Resources and the Office of the Secretary of the Department, and to establish three bureaus: the Bureau of Commerce; the Bureau of Employment Programs; and the Bureau of the Environment.<sup>95</sup> The Bureau of the Environment consists of the Air Quality Board, the Solid Waste Management Board, the Environmental Quality Board, the Division of Environmental Protection, the Surface Mine Board, the Oil and Gas Inspectors' Examining Board, the Shallow Gas Well Review Board, and the Oil and Gas Conservation Commission. The Bureau of Commerce includes the Division of Labor, the Office of Miners' Health, Safety, and Training, the West Virginia Development Office, the Division of Tourism, the Division of Natural Resources, the Divi-

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2-1f (1994).

County Commission Clearance of Refuse — The Reorganization Bill amended provisions in existing law concerning the clearance of refuse or debris which had accumulated on private land that presented a safety or health hazard. W. VA. CODE § 7-1-3ff (1994). The statute was expanded to include State Fire Marshals within this cleanup authority, with the specific purpose of addressing the removal of fire debris that may include toxic or contaminated spillage or seepage.

94. The amendments to the hazardous waste statutes included:

Hazardous Waste Training — The Reorganization Bill contains a revision to the authority of the Director to promulgate hazardous waste training certification requirements. W. VA. CODE § 22-18-6(7) (1994). This revision was necessitated by concerns that the federal hazardous waste training program had pre-empted state requirements.

Recycled Oil — The Reorganization Bill also included a provision recommended by the Advisory Board that DEP be given additional authority to regulate "used oil" in a manner consistent with the federal requirements. W. VA. CODE § 22-18-6(14) (1994).

Hazardous Waste Rule Review — The Reorganization Bill extended from six months to two years the time period for hazardous waste rule revision following a change in federal hazardous waste requirements. W. VA. CODE § 22-18-6(b) (1994).

95. 1994 W. Va. Acts ch. 63, W. VA. CODE §§ 5F-2-1, -5, -6 (Supp. 1994). *See also* Exec. Order Nos. 5-94 & 6-94 (1994).

sion of Forestry, Geologic and Economic Survey, and the Water Development Authority.<sup>96</sup>

The revised statute provides that the Governor may appoint a statutory officer to serve the functions formerly within the Department of Commerce, Labor, and Environmental Resources, which was filled by the Secretary *ex officio*. The bureaus are to be headed by a Commissioner or other statutory officer of an agency within that bureau. The interpretation of House Bill 4030 has been that the Governor will appoint each statutory officer. In the case of the Bureau of the Environment, the Governor appointed the Director of the DEP to fulfill the Secretary's former responsibilities as administrative support and liaison with the Governor's office, other department secretaries, and other bureaus.

The same legislation that abolished this cabinet position also granted the Governor the authority to transfer from the departments and agencies, by executive order, any or all of the boards which are appellate bodies or were otherwise established to be independent decision makers.<sup>97</sup> Included on the list of independent boards are the Air Quality Board, the Environmental Quality Board, the Surface Mine Board, and the Shallow Gas Well Review Board.<sup>98</sup> The authority to accomplish this transfer expired on January 1, 1995.<sup>99</sup> No action of the Governor was taken by that deadline.

#### *F. Office of Business Registration*

For several years, business leaders and economic development advocates have been requesting a reduction in the state's administrative processes that hinder the expansion and development of business in West Virginia. The numerous agencies and fragmented requirements involved in the start up of a new business in West Virginia are often the target of debate. House Bill 4025, passed on March 2, 1994, was

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96. *Id.*

97. W. VA. CODE § 5F-2-5 (1994).

98. W. VA. CODE § 5F-2-5(b) (1994).

99. W. VA. CODE § 5F-2-5(d) (1994).

designed to address these concerns.<sup>100</sup> This bill created the Office of Business Registration (OBR) within the Department of Tax and Revenue, which provides for “one stop shopping” for new businesses. It was the final legislative initiative adopted by the 1994 Legislature to consolidate and streamline environmental regulation in West Virginia.

The OBR has the basic purpose of streamlining the state’s permitting, licensing, and authorization process for the business community. The OBR is to acquire and maintain a central repository of information that businesses need to ensure compliance with statutory mandates and regulatory obligations.<sup>101</sup> The OBR is designed to achieve the legislative goals of promoting consistent, fair, and efficient compliance with registration, licensing, and other similar statutory obligations by all businesses, as well as developing a simplified business registration system to make government more responsive to the needs of West Virginia businesses.<sup>102</sup>

The new statute directs the OBR to establish a system of centralized records, develop a centralized database for the acquisition and storage of information that various departments, divisions, and agencies of state government may require for registration, licensing, and similar statutory requirements related to the initiation of a new business.<sup>103</sup> The OBR must maintain an agency contact list, which includes the different government agencies and legal requirements for licensing and permitting business activities. Once a business registers, the OBR is charged with providing the business with the licensing, permitting, and registration requirements of those government agencies.<sup>104</sup>

While the new business receives the information necessary to lawfully initiate a new venture, the government agencies also have the information available in the central database with which to track new entities and ensure compliance with state laws. A new business must register with the OBR and supply pertinent information which may be disseminated to state agencies. Information submitted is classified as

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100. 1994 W. Va. Acts ch. 17, W. VA. CODE §§ 11-12D-1 to -6 (1994).

101. W. VA. CODE § 11-12D-2(c) (1994).

102. W. VA. CODE § 11-12D-1 (1994).

103. W. VA. CODE § 11-12D-2 (1994).

104. W. VA. CODE § 11-12D-3 (1994).

confidential and subject to disclosure to the same extent as is taxpayer information.<sup>105</sup>

To design and implement the business registration system, an advisory group of interagency representatives was established, and includes representatives of the West Virginia Development Office and the Bureau of the Environment.<sup>106</sup> For continued refinement of the program, the advisory group and the OBR are to make joint recommendations to further simplify the dealings of businesses with West Virginia government agencies.<sup>107</sup>

### *G. Implementing Rules*

The statutory reorganization of the environmental program created the subsequent responsibility of revising the administrative regulations to reflect the changes in the law. Rules already promulgated by the DEP, the Division of Natural Resources, the Air Pollution Control Commission, and the Water Resources Board will require significant substantive and editorial changes. In some instances a simple name change for the referenced agency will be done, in other instances a different agency has been assigned the duty of administering and promulgating a new or existing rule requiring a more substantive change. Efforts have been made to determine a course of action that would allow for a smooth transition with minimal confusion on the part of government regulators and the public.

The Secretary of State has reorganized the titles of various rules corresponding to the effective date of House Bill 4065, June 10, 1994.<sup>108</sup> The West Virginia Code of State Regulations was modified

105. W. VA. CODE § 11-12D-4 (1994); W. VA. CODE §§ 11-10-5d, 5e (1994).

106. W. VA. CODE § 11-12D-2(b) (1994).

107. W. VA. CODE § 11-12D-2(f) (1994).

108. Notice filed by the Secretary of State, June 10, 1994 as follows:

Title 38 — Environmental Protection, Mining and Reclamation.

Title 45 — Environmental Protection, Air Quality (former Air Pollution Control Commission regulations).

Title 46 — Environmental Protection, Environmental Quality Board (former Water Resources Board regulations).

as follows: The former Division of Environmental Protection (formerly the Division of Energy) was assigned Title 38 and included all the previously authorized rules related to mining and reclamation. Air Pollution Control Commission rules remain codified as Title 45 and were changed to the Division of Environmental Protection, Air Quality rules. Title 47 was reserved for surface and groundwater quality standards. A new Title 52 was created for the Air Quality Board rules which will incorporate that portion of former Title 45 relating to procedures before the board. The Division of Natural Resources regulations have been assigned Title 58.

## V. AREAS FOR FUTURE LEGISLATION

While the DEP Reorganization Bill addressed and resolved most issues confronting the consolidation of environmental regulation, several issues remain that will need to be taken up in future legislative sessions.

### A. *Funding*

The funding of the various environmental programs is a subject of great concern among the regulated community (which pays the user fees to the programs), the Legislature (which appropriates the funds), the DEP (which ultimately expends those funds), and the environmental community (which has an interest in influencing the manner in which the funds are spent). Currently, the Legislature has prevailed in its view that the Legislature itself will control how the DEP expends funds from both general and special revenue accounts.

The regulated community can be expected to continue its support for the dedication of user fees to the environmental programs under

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Title 47 — Environmental Protection, Water Resources — Waste Management (formerly included DNR hunting and fishing regulations).

Title 52 — Environmental Protection, Air Quality Board (former 45 W. VA. C.S.R. 26).

Title 58 — Division of Natural Resources (includes DNR hunting and fishing regulations, but excludes former water resources and waste management regulations).



which they were collected. For those accounts in which surplus monies occur, the regulated community can be expected to urge the reduction of the underlying fees instead of the reallocation of those fees for other purposes.

The DEP can be expected to share much of the regulated community's position on this issue. The DEP has expressed concern over the potential for the reallocation of its special revenue accounts by the Legislature. The practical result of the Legislature transferring funds is that either the DEP must cut the affected program from which the funds were taken or shift funds from other accounts within its control to offset the difference. The DEP can be expected to urge that the agencies' best interests are served by having security and predictability in its financial affairs. The DEP has asked that it be provided the assurance that any surplus attributable to a particular account would remain intact for use in capital expenditures or for transfer within the agency to offset deficiency in other accounts.

The environmental community's goals and objectives for the collection of monies and the allocation of those funds for the state's environmental programs may be very similar to that of the DEP and the regulated community. While the environmental community would likely support the continuation of the legislative oversight authority for allocation of state monies, the environmental community has long supported proper funding for regulatory agencies.

The Legislature has the ultimate responsibility under the Constitution to appropriate funds.<sup>109</sup> Attendant to that constitutional responsibility is the obligation to determine the priorities for the allocation of state monies. Efforts have been made to redefine special revenue accounts to provide security of those funds by limiting the Legislature's reallocation of those monies. Currently, special revenue accounts are classified as state monies and are managed by the Legislature in the same manner as are all other funds.<sup>110</sup>

The DEP, the regulated community, and the environmentalists, acting as members of the DEP Reorganization Advisory Board, have

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109. W. VA. CONST. art. VI, § 51.

110. W. VA. CODE § 12-2-2 (1991).

initiated proposals to restrict the environmental accounts to prevent their reallocation to other programs. Further debate will be required to arrive at a consensus for the management of these special revenue accounts and to redefine the Legislature's role in the management of these accounts.

### *B. Appellate Functions*

Prior to the passage of the Reorganization Bill and House Bill 4030, each environmental appeal board, the Air Pollution Control Commission, the Water Resources Board, and the Reclamation Board of Review, had its own administrative procedures and substantive review requirements. The modifications resulting from the Reorganization Bill have achieved a significant measure of standardization of the boards' procedural processes. The result has been the taking of initial steps toward streamlining the administration of the environmental appellate boards. These steps, however, leave open for further consideration the consolidation of all appellate functions into a single body.

While uniform procedures have been accomplished for the three existing appeal boards, the standards of review for the boards remain inconsistent. In acting on the DEP Reorganization Bill in 1994, the Legislature considered, but rejected, revising the legal standard of review by all of the appeal boards. Creation of a uniform standard was not achieved because of the historical legal precedent of each of the boards.<sup>111</sup> Debate over modification to the "lawful and reasonable" standard for the Director's decisions under the Surface Mine Board statute resulted in a conclusion not to revise the Code to create a uniform standard of review for all boards.

Future options for modification to the appellate process range from revising the entire appellate framework to building upon the recent procedural modifications. The limited resources of the state may make the establishment of an entirely new appeal board with new funding, independent procedures, expanded staff and offices an unlikely scenario.

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111. W. VA. CODE § 22B-1-7(g)(1) (1994).

A significant factor in limiting efforts to modify the environmental appeal boards is the unique demand for expertise involved in administering the environmental laws. The environmental program by its very nature is extremely broad in scope, encompassing a combination of many subdisciplines and subsets of the law (i.e., waste, water, air, coal, oil and gas, etc.). The current board members of the Air Quality Board, the Environmental Quality Board, and the Surface Mine Board, through their tenure and background, have developed precedent and expertise that are valuable resources.

The current appellate structure is under continued analysis to determine if it adequately serves the public, the regulated community, and the government agencies. Legislative interim committees are currently studying available data on the appellate system and considering modification of that system. Numerous possibilities have been offered for discussion, including retaining the three appellate boards, creating a single appellate board, providing for the use of hearing examiners, and providing for the use of administrative environmental law judges. Each possibility presents problems and solutions, and the final choice is yet to be determined.

### *C. Environmental Policy*

For several years, proposals have been presented to the Legislature calling for the establishment of a comprehensive state environmental policy. The common theme of these proposals is the requirement that an environmental impact statement be required each time state government engages in a project that may significantly impact the environment.<sup>112</sup>

Initiatives to create a state environmental policy have not been successful because, in major part, there has been no widespread support for such an initiative. This may be related to concerns over the cost burden of such a proposal on the DEP and to a lack of well-defined

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112. See, e.g., S.B. 456 & S.B. 589, Reg. Sess. (1991); H.B. 4641 & S.B. 464, Reg. Sess. (1992); H.B. 4682, Reg. Sess. (1994).

need. In any case, the merit of a state environmental policy will continue to be an issue for future legislative debate.

## VI. CONCLUSION

After nearly a quarter of a century of management of environmental programs through a multiplicity of independent agencies, West Virginia now has its first true consolidated environmental program. As the result of the passage of several critical pieces of legislation in 1994, the West Virginia Legislature has delegated responsibility for the management of the principal environmental programs to the Division of Environmental Protection.

This has not been an easy public policy decision for West Virginia. Initial efforts to consolidate the programs applicable to the coal industry failed when the public and the Legislature lost confidence in the Department of Energy. Many of those who opposed earlier initiatives are already beginning to question the merit of an even more significant consolidation of authority in the Division of Environmental Protection.

While no system is ever perfect, what is most needed at this time in West Virginia's environmental regulatory programs is a period of relative stability. Efforts must now focus on strengthening newly formed agencies and developing the infrastructure necessary to allow environmental regulation to be conducted in an effective and professional manner.

There will always be the need for refinements in the environmental regulatory programs at both the statutory and regulatory levels. The processes created through the DEP Advisory Council should provide an effective forum within which these changes can be debated. As history now records with the passage of the DEP Reorganization Bill, such advisory forums are successful.

The establishment of the DEP as the focal point for the state's environmental programs and the restructuring of the remainder of the state's environmental laws are landmark initiatives by both the Governor and the Legislature. These efforts will serve the state well for many years to come.

