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WEST VIRGINIA LAND STEWARDSHIP CORPORATION
Enrolled Com. Sub for H. B. 2590

Overview

Enrolled Com. Sub. For H. B. 2590 (hereinafter HB 2590)) – to be known as the West Virginia Land Stewardship Act -- passed the West Virginia Legislature on April 13, 2013, was signed by Governor Earl Ray Tomblin on April 29, 2013, and takes effect July 12, 2013.

This bill authorizes creation of a special purpose nonprofit corporation under the West Virginia Nonprofit Corporation Act, W. Va. Code § 31E-1-1 *et seq.*, to be known as the West Virginia Land Stewardship Corporation. The corporation is required to apply to the Internal Revenue Service for a determination that it is exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. The corporation is exempt from state and local taxes. The corporation's board of directors consists of 13 members: 11 of whom are appointed by the Governor,¹ one *ex officio* member appointed by the President of the Senate, and one *ex officio* member appointed by the Speaker of the House of Delegates.

The corporation is required to establish a voluntary land stewardship program and a voluntary state certified sites program. Additionally, the corporation may establish a voluntary land bank program.

Discussion

Mission of West Virginia Land Stewardship Corporation

The mission of the New Corporation is to:

- (1) Assist the Department of Environment Protection (DEP) in utilizing a voluntary land stewardship program for the long-term safeguarding of Institutional and Engineering Control Sites² (IEC Sites) to ensure that the remedy remains protective of human health and the environment and to facilitate further economic development and reuse opportunities;
- (2) Provide the DEP and other parties with a reliable source of oversight, monitoring and information about IEC Sites under the voluntary land stewardship program;

¹ The Governor's appointees consist of the Secretary of the Department of Environmental Protection or his or her designee, the Secretary of the Department of Commerce or his or her designee, three residents of this State, one person recommended by West Virginia Chamber of Commerce, one person recommended by the West Virginia Manufacturers' Association, one person recommended by the West Virginia Coal Association, one person recommended by the United Mine Workers Association, and one person recommended by the AFL-CIO.

² "Institutional and Engineering Control Sites" or "IEC Sites" is defined in Section 31-25-2(15) and means "sites in this state that have been remediated or closed under a federal or state environmental program, including, but not limited to, brownfields, underground storage tanks, closed landfills, open dumps, hazardous waste sites, and former mining sites with ongoing water treatment as part of mine reclamation efforts."

- (3) Establish a land bank as a legal and financial mechanism to accept title to properties and assist in transforming idled and underutilized properties back to productive reuse;
- (4) Facilitate reuse and redevelopment by authorizing the conveyance of certain properties to a land bank under a voluntary land bank program and assist the state and local governments with the assembly and clearance of title to property in a coordinated manner;
- (5) Promote economic growth by implementing a state certified sites program to identify sites that are ready for construction within 12 months or less and that are certified “project-ready” for specific industry profiles as well as other categories of sites identified for economic development opportunities;
- (6) Provide voluntary programs on a fee or subscription basis with the New Corporation to protect human health and the environment as well as assist with a variety of economic development efforts throughout the state. Section 31-21-4(1)-(6).

The New Corporation has all the powers of a corporation created pursuant to the West Virginia Nonprofit Corporation Act, W. Va. Code § 31E-1-1 *et seq.*, plus the powers set forth in HB 2590.

The exercise by the New Corporation of its powers, duties and activities under HB 2590 are declared to be necessary for public purposes and for the benefit of the public. Subsection 31-21-5(j).

The New Corporation is not liable under the environmental acts³ or common law equivalents to the State of West Virginia or to any other person by virtue of the fact that the corporation is fulfilling the purposes of HB 2590 including, but not limited to, providing land stewardship services or accepting title to property under any program established under HB 2590 unless:

- (1) The New Corporation, its employees or agents directly cause an immediate release⁴ or directly exacerbate a release of regulated substances⁵ on or from a property that is an enrolled site or accepted into the land bank program; or

³ “Environmental acts” is defined in Section 31-21-2(13) and means “the Surface Coal Mining and Reclamation Act set forth in article three, chapter twenty-two of this code; the Air Pollution Control Act set forth in article five, chapter twenty-two of this code; the Water Pollution Control Act set forth in article eleven, chapter twenty-two of this code; the Groundwater Protection Act set forth in article twelve, chapter twenty-two of this code; the Solid Waste Management Act set forth in article fifteen, chapter twenty-two of this code; the Solid Waste Landfill Closure Assistance Program set forth in article sixteen, chapter twenty-two of this code; the Underground Storage Tank Act set forth in article seventeen, chapter twenty-two of this code; the Hazardous Waste Management Act set forth in article eighteen, chapter twenty-two of this code; section 103(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U. S. C. §9603(a)); section 304 of the Emergency Planning and Community Right-To-Know Act of 1986 (42 U. S. C. §§11001 to 11050); the Occupational Safety and Health Act set forth in 29 U. S. C. §§651 to 678; the Hazardous and Solid Waste Amendments of 1984, as amended, set forth in 42 U. S. C. §§6901, *et seq.*; and the Toxic Substances Control Act set forth in 15 U. S. C. §§2601, *et seq.*; and any applicable regulations promulgated under the foregoing environmental statutes.”

⁴ “Releases” is defined in Section 31-21-2(22) and has the same meaning as defined in the environmental acts referenced in Section 31-21-2(13). *See* footnote 5, *supra*.

⁵ “Regulated substances” is defined in Section 31-21-2(21) and has the same meaning as defined in the environmental acts referenced in Section 31-21-2(13). *See* footnote 5, *supra*.

(2) The New Corporation, its employees or agents knowingly and willfully do an action which causes an immediate release of regulated substances or violates an environmental act. The New Corporation's liability is limited to the cost for a response action which may be directly attributable to the New Corporation's activities, but only if these activities are the proximate and efficient cause of the release or violation. Ownership or control of the property after accepting title in the land bank program does not by itself trigger liability. Subsection 31-21-5(k).

The programs that are established under HB 2590 and administered by the New Corporation are voluntary programs. Parties can participate in the land stewardship program, certified sites program and land bank program at their option. Subsection 31-21-5(n).

In the event of a conveyance of property to the New Corporation, the Corporation, at its discretion, may require the prior owner to post a bond or other type of financial assurance for any potential future remediation, in order to ensure the original owner's liability is maintained. Subsection 31-21-5(o).

Voluntary Land Stewardship Program

The voluntary land stewardship program is created in Section 31-21-7.

Once the voluntary land stewardship program is implemented, remediation parties and owners of IEC Sites will have the option, for a fee, to participate in this program. The fee will be established by the New Corporation for services provided for an enrolled site.⁶ The fees once established may be revised from time to time in the discretion of the board. Subsection 31-21-7(a).

The universe of sites or properties that may be included in voluntary land stewardship program includes, but is not limited to, those IEC Sites remediated or closed under a federal or state environmental program, including brownfields, underground storage tanks, closed landfills, open dumps, hazardous waste sites, and former mining sites with ongoing water treatment as part of mine reclamation efforts. Subsection 31-21-7(b).

The New Corporation must provide, at a minimum, the following voluntary land stewardship services for enrolled sites:

- (1) Establish or maintain institutional controls (ICs)⁷ by filing the appropriate documents or updating such documents when the site is leased, conveyed, subdivided or when remediation

⁶ "Enrolled sites" is defined in Section 31-21-2(15) and means "properties enrolled and accepted for participation in the voluntary Land Stewardship Program."

⁷ "Institutional Controls" or "ICs" is defined in Section 31-21-2(17) and means "administrative and legal controls that do not involve construction or physically changing the site and are generally divided into four categories: 1) Government controls, 2) Proprietary controls, 3) Enforcement tools, and 4) Informational devices. ICs are nonengineering measures that help minimize the potential for human exposure to contamination and/or protect the integrity of the remedy by limiting land or resource use."

occurs. However, the New Corporation is responsible for only those activities that are expressly identified in written agreements for the IEC Site that will be negotiated when a site is enrolled in the voluntary land stewardship program;

(2) Conduct physical inspections of the enrolled sites, including inspecting or monitoring any engineering controls (ECs)⁸ (e.g., media treatment systems, fences, caps and other mechanisms used as part of the remedy at the IEC Site) and site activities to assure that the enrolled sites continue to comply with the IECs, such as maintenance of ECs and inspecting for compliance with restrictions of specific land uses;

(3) Monitor and operate any required media treatment systems and/or conduct routine surface water, groundwater and or gas monitoring, and prepare any monitoring or inspection reports that may be part of the New Corporation's responsibilities under site enrollment agreements;

(4) Conduct periodic reviews of the county land records to monitor transfers or deed filings to assure that the records are consistent with the required IECs for the enrolled sites, and provide notices to the clerk of the county commission about the results of monitoring or tracking of such records;

(5) Develop administrative records concerning the remediation at enrolled sites in an electronic database, respond to inquiries and coordinate the sharing of such data among various stakeholders, including the DEP, current owners, the remediating parties if not the owners, other state or local agencies (such as county and regional economic development authorities), assessors, potential purchasers, landowners and tenants;

"Governmental controls" is defined in Section 31-21-2(14) and means "any state laws, ordinances, orders, permits, consent decrees and similar mechanisms which restrict or control certain land uses implemented at IEC Sites in this state."

"Proprietary controls" is defined in Section 31-21-2(20) and mean "legal property interests created under real property laws that rely on legal documents recorded in the chain of title for the site, and "run with the land" to bind future landowners. Examples of proprietary controls include, but are not limited to, environmental covenants, deed land use restrictions, water withdrawal prohibitions and continuing right-of-entry easements for former owners or regulators to inspect, monitor and maintain the IECs.

"Enforcement tools" is defined in Section 31-21-2(10) and means "any order, permit, consent decree or environmental covenant or similar mechanisms which restrict or control certain land uses implemented at IEC Sites."

"Informational devices" is defined in Section 31-21-2(16) and means "deed notices or other written documents that describe the remediation that was conducted on an IEC Site, the constituents of concern, and the remediation standards that were achieved. Informational devices shall be filed with property records in the office of the county clerk of the county in which the property is located as an advisory to provide environmental information to future buyers or users of the IEC Site."

⁸ "Engineering controls" or "ECs" is defined in Section 31-21-2(11) and means "physical controls or measures designed to eliminate the potential for human exposure to contamination by limiting direct contact with contaminated areas, or controlling contaminants from migrating through environmental media into soil, groundwater or off-site." "Contaminants" is defined in Section 31-21-2(6) and has the same meaning as defined in the environmental acts referenced in subdivision (13) of that section.

(6) Develop and maintain records and information about enrolled sites for posting on the DEP environmental registry, or any other registry that is used for tracking IECs for IEC Sites in West Virginia and provide for public access to this information; and

(7) Coordinate and share data with West Virginia Miss Utility, the “One-Call” System, including verifying the location of ECs on enrolled sites, providing information about remediation, and sharing any health and safety plans or soil management plans that may be associated with an enrolled site in order to assist any planned excavation at the enrolled site. Subsection 31-21-7(c)(1)-(7).

Underwriting

An underwriting review of the property must be made as part of the enrollment and acceptance process before the property can be included in the land stewardship program. Section 31-21-8. The underwriting review focuses on:

- (1) The nature and extent of contamination;
- (2) The selected remedy;
- (3) The type of services selected and duration thereof; and
- (4) The financial costs and risks associated with fulfilling the services.

State Certified Sites Program

The New Corporation is required to establish a State certified⁹ sites program. Section 31-21-9. This program will consist of the development and preparation of certain site specific decision ready documentation or reports that will enable the expedited property transaction for sites that participate in the certified sites program. Subsection 31-21-9(a).

Objectives of the certified sites program include, but are not limited to:

- (1) Establishing an inventory of identified sites that are ready for development or redevelopment and construction within 12 months or less from the date of acquisition and certify these properties as “project-ready” for specific industry profiles and other categories of developable properties available that can increase economic development efforts within the State;
- (2) Improving this State’s competitive edge by giving more certainty in time, steps and costs to businesses expanding or locating within the State;

⁹ “Certified sites” is defined in Section 31-21-2(4) and means “those sites that are developable properties that have been prequalified as having proper land use designation, utilities, transportation improvements, availability, and pricing. Criteria for prequalification include, but are not limited to, established pricing terms and conditions so that property acquisition can be negotiated quickly and without time-consuming delays.”

- (3) Developing standard criteria that most real estate developers or businesses need when selecting a site for development;
- (4) Developing a central source of certified sites and assisting local governments in identifying potential redevelopment properties; and
- (5) Demonstrating that the State is committed to promoting and expediting economic development projects for the benefit of its citizenry. Subsection 31-21-9(b).

The New Corporation will issue a site certification if it determines that the decision ready document has been prepared and completed in accordance with the requirements set forth by the Corporation. The Corporation may require some or all of the following information set forth in Section 31-21-10 of this article based on the site specific circumstances of the property to be certified. Subsection 31-21-9(c). *See discussion, infra.*

The issuance of a site certification will be based on the review and approval of the information submitted to the New Corporation in an application for the site certification. Subsection 31-21-9(d).

Minimum Standards For Certified Sites

The New Corporation is required to establish minimum standards that a site must meet to be considered for certification. Section 31-21-10. Minimum standards include, but are not limited to:

- (1) Letter of support from a mayor, county commissioner, or county, regional, or municipal economic development official;
- (2) Site ownership/control:
 - (A) Preliminary 50-year title report and description of liens and encumbrances, unless the New Corporation determines that a shorter period is adequate, or a longer period is necessary, to protect the New Corporation and a subsequent purchaser of the site;
 - (B) Letter from the property owner/option holder stating that the site is for sale/lease. This letter should include, if possible, proposed pricing or transactional requirements and provide a description of any on-site improvements, the current level of investment, and whether the property can be parceled;
 - (C) Acreage; and
 - (D) Full legal property description.
- (3) Maps:
 - (A) ALTA map;
 - (B) Site map showing lot layout, transportation access, roads and likely access points;
 - (C) USGS topographical map; and

(D) Aerial map.

(4) Phase I environmental site assessment performed by a certified professional within the prior six months, and, if appropriate, any additional environmental site assessments performed by a certified professional within the prior six months.

(A) For any properties being remediated, documentation must be provided about the status and cleanup objectives.

(B) For remediated sites, documentation must be provided about liability protection.

(5) Wetland delineation demonstrating that impacts to waters of this State will be avoided or a mitigation plan approved by the DEP.

(6) Water and wastewater infrastructure to the property line with capacity clearly defined, or a demonstration of the ability to construct and pay for the infrastructure up to the property line.

(7) Transportation infrastructure to the property line, including, but not limited to, the type of roads near the site and whether the roads are local, state or U. S. roads.

(8) Electric infrastructure to the property line with its capacity clearly identified.

(9) Natural gas infrastructure to the property line with its capacity clearly identified.

(10) Water infrastructure to the property line with its capacity clearly identified.

(11) Sewer infrastructure to the property line with its capacity clearly identified.

(12) Telecommunications and/or high speed communications infrastructure to the property line with its capacity clearly identified.

The complete list of certified sites criteria is to be developed into a program application along with appropriate fees for participation as the certified sites program is implemented Subsection 31-21-10(b). The fees may be revised from time to time as warranted.

Land Bank Program

The New Corporation is authorized in Subsection 31-21-11(a) to establish a voluntary state land bank program. Under this program, the New Corporation may acquire properties, hold title and prepare them for future use. Prior to acquiring any properties, the New Corporation must conduct all appropriate inquiries¹⁰ to determine the environmental conditions or issues associated with a particular property. The New Corporation may not acquire title to any property unless all pending liens have been satisfied and

¹⁰ “All appropriate inquiries” or “AAI” is defined in Section 31-21-2(2) and means the process of evaluating a property’s environmental conditions and assessing the likelihood of any contamination. Every Phase I environmental assessment must be conducted in compliance with the All Appropriate Inquiries Final Rule at 40 CFR Part 312.

released. Liabilities, including, but not limited to, environmental liabilities, may not be passed to the corporation by its acquisition of title to the property. Participation in the land bank program does not relieve an entity of any of its environmental liabilities.

The objective of the land bank program is to assist state and local government efforts for economic development by accepting formerly used or developable properties and preparing the properties so they can be conveyed to other parties to locate or expand businesses and create or retain jobs in this State. Subsection 31-21-11(b).

The New Corporation may acquire by gift, devise, transfer, exchange, foreclosure, purchase or otherwise on terms and conditions and in a manner the New Corporation considers proper, real or personal property or rights or interests in real or personal property. The New Corporation may not accept by any conveyance or other action, any liability for prior pollution or contamination liabilities that occurred on the property prior to its conveyance to the New Corporation. Subsection 31-21-11(c).

Real property acquired by the New Corporation may be by purchase and sale agreement, lease purchase agreement, installment sales contract, land contract or otherwise as may be negotiated or structured.¹¹ Subsection 31-21-11(d). The New Corporation may acquire real property or rights or interests in real property for any purpose the New Corporation considers necessary to carry out the purposes for enactment of HB 2590 including, but not limited to, one or more of the following purposes:

- (1) Use or development of property the New Corporation has otherwise acquired;
- (2) To facilitate the assembly of property for sale or lease to any other public or private person, including, but not limited to, a nonprofit or for profit corporation;
- (3) To conduct environmental remediation and monitoring activities.

The New Corporation may also acquire by purchase, on terms and conditions and in a manner the New Corporation considers proper, property or rights or interests in property. Subsection 31-21-11(e). The New Corporation does not have the power of eminent domain or the ability to condemn property. Subsection 31-21-5(i).

The New Corporation may hold and own in its name any property acquired by it or conveyed to it by this State, a foreclosing governmental unit, a local unit of government, an intergovernmental entity created under the laws of this State or any other public or private person. Subsection 31-21-11(f).

¹¹ Property owned by New Corporation or a single purpose entity created by the corporation is exempt from ad valorem property taxation. Subsection 31-21-5(g). Property owned and leased by the corporation as lessor to a commercial lessee or an industrial lessee is declared to be tax exempt and held by the corporation for a public purpose. However, a payment in lieu of taxes, payable by the lessee, must be established for any property so leased, in an amount not to be less than the property tax otherwise payable on the property. The lessee's leasehold interest therein is hereby declared to be a tax exempt leasehold interest held for a public purpose so long as the payment in lieu of taxes is timely paid. Payments made to any county commission, county school board or municipality in lieu of tax pursuant to such agreement are to be distributed as if the payments resulted from ad valorem property taxation.

All deeds, mortgages, contracts, leases, purchases or other agreements regarding property of the New Corporation, including agreements to acquire or dispose of real property, must be approved by the board of directors and executed in the name of the New Corporation or any single purpose entity created by the board for the transaction. Subsection 31-21-11(g).

All property held by the New Corporation or a single purpose entity created by the board for a transaction must be inventoried and classified by the New Corporation according to title status and suitability for use. Subsection 31-21-11(h).

A document including, but not limited to, a deed evidencing the transfer under HB 2590 of one or more parcels of property to the New Corporation by this State or a political subdivision of this State may be recorded within the office of the county clerk of the county in which the property is located without the payment of a fee.¹² Subsection 31-21-11(i).

The New Corporation is required to notify the county commission and county assessor in the affected county or counties upon receipt of an application for participation in the land bank program. Subsection 31-21-11(j).

Preservation of property value

The New Corporation may, without the approval of a local unit of government in which property held by the corporation is located, control, hold, manage, maintain, operate, repair, lease as lessor, secure, prevent the waste or deterioration of, demolish and take all other actions necessary to preserve the value of the property held or owned directly by the New Corporation or by a single purpose entity created by the board for that purpose. Subsection 31-21-12(a).

The New Corporation may, pursuant to Subsection 31-21-12(b), take or perform the following with respect to property held or owned by the New Corporation or by any special purpose entity created by the board:

- (1) Grant or acquire a license, easement, or option with respect to property as the New Corporation determines is reasonably necessary to achieve the purposes of HB 2590;
- (2) Fix, charge, and collect rents, fees and charges for use of property under the direct or indirect control of the New Corporation or for services provided by the New Corporation;
- (3) Take any action, provide any notice or institute any proceeding required to clear or quiet title to property held by the New Corporation in order to establish ownership by and vest title to property in the New Corporation or a special purpose entity created by the board; and
- (4) Remediate environmental contamination on any property held by the New Corporation.

Except as the New Corporation otherwise agrees by agreement or otherwise, on terms and conditions, and in a manner and for an amount of consideration the New Corporation considers proper,

¹² Transfers to or from the United States, the State of West Virginia, or to or from any of their instrumentalities, agencies or political subdivisions, by gift, dedication, deed or condemnation proceeding are not subject to the excise tax imposed by W. Va. Code § 11-22-2 on the privilege of transferring real property.

fair and valuable, including for no monetary consideration, the New Corporation may convey, sell, transfer, exchange, lease as lessor or otherwise dispose of property or rights or interests in property in which the New Corporation directly or indirectly holds a legal interest to any public or private person for value determined by the New Corporation. Subsection 31-21-12(c).

The New Corporation must be made a party to and is required to defend any action or proceeding concerning title claims against property held directly or indirectly by the New Corporation. Subsection 31-21-12(d).

Contaminated property

If the DEP determines that conditions on a property transferred to the New Corporation under HB 2590 present an immediate threat to public health, safety and welfare, or to the environment, the New Corporation may not convey, sell, transfer, exchange, lease or otherwise dispose of the property until after a determination is made by the DEP that the threat has been remediated and/or eliminated and that conveyance, sale, transfer, exchange, lease or other disposal of the property by the New Corporation will not interfere with any of the DEP's response activities. Additionally, the New Corporation must coordinate with the DEP regarding the corporation's activities at the property. Subsection 31-21-13(a).

If the New Corporation has reason to believe that property held by the New Corporation may be the site of environmental contamination, the New Corporation must provide the DEP with any information in the possession of the New Corporation that suggests that the property may be the site of environmental contamination. Subsection 31-21-13(b).

If property held directly or indirectly by the New Corporation is a site impacted by contamination, pollution, hazardous substances, hazardous or other wastes as defined in the environmental acts,¹³ prior to the sale or transfer of the property under Section 31-21-13, the property is subject to all of the following:

- (1) Upon reasonable written notice from the DEP, the New Corporation must provide access to the DEP, its employees, its contractors and any other person expressly authorized by the DEP to conduct an investigation and/or response activities at the property. Reasonable written notice may include, but is not limited to, notice by electronic mail or facsimile, in advance of access as the DEP and New Corporation may agree.
- (2) If the DEP determines it is necessary to protect public health, safety and welfare or the environment, the New Corporation must place and record deed restrictions on the property as authorized under West Virginia environmental statutes.

For additional information, please contact your Spilman Thomas & Battle, PLLC attorney or contact:

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¹³ "Environmental acts" is defined in footnote 3, *supra*.